CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 33 **JULY 28, 1999** **NO. 29/30**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 99–52)

CUSTOMS APPROVAL OF VIP CHEMICAL INCORPORATED AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Approval of VIP Chemical, Incorporated, of Corpus Christi, Texas, as a Commercial Gauger.

SUMMARY: VIP Chemical, Incorporated, of Corpus Christi, Texas, has applied to U.S. Customs for approval to gauge petroleum and petroleum products, organic chmeicals and vegetable oils under Part 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that this company meets all of the requirements for approval as a commercial gauger. Therefore, in accordance with Part 151.13(f) of the Customs Regulations, VIP Chemical, Incorporated, of Corpus Christi, Texas is hereby approved to gauge the products named above in all Customs ports.

LOCATION: VIP Chemical Incorporated approved site is located at: Poth Lane (Hess Oil Terminal) Corpus Christi, Texas, 78408.

EFFECTIVE DATE: July 6, 1999.

FOR FURTHER INFORMATION CONTACT: Michael Parker, Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, Room 5.5–B, Washington, D.C. 20229 at (202) 927–2666.

Dated: July 9, 1999.

IRA S. REESE,
Acting Executive Director,
Laboratories and Scientific Services.

[Published in the Federal Register, July 15, 1999 (64 FR 38235)]

(T.D. 99–53)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List for June 1999

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): None.

Austria schilling:

June 1, 1999	$0.075936
June 2, 1999	.075267
June 3, 1999	.075253
June 4, 1999	.075049
June 5, 1999	.075049
June 6, 1999	.075049
June 7, 1999	.074824
June 8, 1999	.075856
June 9, 1999	.075943
June 10, 1999	.076139
June 11, 1999	.076423
June 12, 1999	.076423
June 13, 1999	.076423
June 14, 1999	.075696
June 15, 1999	.075725
June 16, 1999	.074838
June 17, 1999	.075064
June 18, 1999	.075347
June 19, 1999	.075347
June 20, 1999	.075347
June 21, 1999	.075020
June 22, 1999	.075020
June 23, 1999	.074969
June 24, 1999	.075376
June 25, 1999	.075929
June 26, 1999	.075929
June 27, 1999	.075929
June 28, 1999	.075384
June 29, 1999	.075122
June 30, 1999	.074925

Belgium franc:

June 1, 1999	$0.025902
June 2, 1999	.025674
June 3, 1999	.025669
June 4, 1999	.025600
June 5, 1999	.025600
June 6, 1999	.025600
June 7, 1999	.025523
June 8, 1999	.025875
June 9, 1999	.025905
June 10, 1999	.025972

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

Belgium franc (continued):

June 11, 1999	$0.026068
June 12, 1999	.026068
June 13, 1999	.026068
June 14, 1999	.025821
June 15, 1999	.025831
June 16, 1999	.025528
June 17, 1999	.025605
June 18, 1999	.025702
June 19, 1999	.025702
June 20, 1999	.025702
June 21, 1999	.025590
June 22, 1999	.025590
June 23, 1999	.025573
June 24, 1999	.025712
June 25, 1999	.025900
June 26, 1999	.025900
June 27, 1999	.025900
June 28, 1999	.025714
June 29, 1999	.025625
June 30, 1999	.025558

Finland markka:

June 1, 1999	$0.175740
June 2, 1999	.174192
June 3, 1999	.174159
June 4, 1999	.173688
June 5, 1999	.173688
June 6, 1999	.173688
June 7, 1999	.173166
June 8, 1999	.175555
June 9, 1999	.175756
June 10, 1999	.176210
June 11, 1999	.176866
June 12, 1999	.176866
June 13, 1999	.176866
June 14, 1999	.175185
June 15, 1999	.175252
June 16, 1999	.173200
June 17, 1999	.173721
June 18, 1999	.174377
June 19, 1999	.174377
June 20, 1999	.174377
June 21, 1999	.173620
June 22, 1999	.173620
June 23, 1999	.173503
June 24, 1999	.174445
June 25, 1999	.175723
June 26, 1999	.175723
June 27, 1999	.175723
June 28, 1999	.174461
June 29, 1999	.173856
June 30, 1999	.173402

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

France franc:

June 1, 1999	$0.159294
June 2, 1999	.157891
June 3, 1999	.157861
June 4, 1999	.157434
June 5, 1999	.157434
June 6, 1999	.157434
June 7, 1999	.156962
June 8, 1999	.159126
June 9, 1999	.159309
June 10, 1999	.159721
June 11, 1999	.150315
June 12, 1999	.160315
June 13, 1999	.160315
June 14, 1999	.158791
June 15, 1999	.158852
June 16, 1999	.156992
June 17, 1999	.157465
June 18, 1999	.158059
June 19, 1999	.158059
June 20, 1999	.158059
June 21, 1999	.157373
June 22, 1999	.157373
June 23, 1999	.157266
June 24, 1999	.158120
June 25, 1999	.159279
June 26, 1999	.159279
June 27, 1999	.159279
June 28, 1999	.158135
June 29, 1999	.157587
June 30, 1999	.157175

Germany deutsche mark:

June 1, 1999	$0.534249
June 2, 1999	.529545
June 3, 1999	.529443
June 4, 1999	.528011
June 5, 1999	.528011
June 6, 1999	.528011
June 7, 1999	.526426
June 8, 1999	.533686
June 9, 1999	.534300
June 10, 1999	.535681
June 11, 1999	.537675
June 12, 1999	.537675
June 13, 1999	.537675
June 14, 1999	.532562
June 15, 1999	.532766
June 16, 1999	.526528
June 17, 1999	.528113
June 18, 1999	.530107
June 19, 1999	.530107
June 20, 1999	.530107
June 21, 1999	.527807
June 22, 1999	.527807
June 23, 1999	.527449
June 24, 1999	.530312

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

Germany deutsche mark:	
June 25, 1999	$0.534198
June 26, 1999	.534198
June 27, 1999	.534198
June 28, 1999	.530363
June 29, 1999	.528522
June 30, 1999	.527142
Greece drachma:	
June 1, 1999	$0.003215
June 2, 1999	.003200
June 3, 1999	.003194
June 4, 1999	.003180
June 5, 1999	.003180
June 6, 1999	.003180
June 7, 1999	.003182
June 8, 1999	.003225
June 9, 1999	.003224
June 10, 1999	.003233
June 11, 1999	.003244
June 12, 1999	.003244
June 13, 1999	.003244
June 14, 1999	.003210
June 15, 1999	.003215
June 16, 1999	.003185
June 17, 1999	.003195
June 18, 1999	.003202
June 19, 1999	.003202
June 20, 1999	.003202
June 21, 1999	.003183
June 22, 1999	.003183
June 23, 1999	.003180
June 24, 1999	.003190
June 25, 1999	.003213
June 26, 1999	.003213
June 27, 1999	.003213
June 28, 1999	.003194
June 29, 1999	.003186
June 30, 1999	.003174
Ireland pound:	
June 1, 1999	$1.326749
June 2, 1999	1.315068
June 3, 1999	1.314814
June 4, 1999	1.311259
June 5, 1999	1.311259
June 6, 1999	1.311259
June 7, 1999	1.307322
June 8, 1999	1.325353
June 9, 1999	1.326876
June 10, 1999	1.330305
June 11, 1999	1.335257
June 12, 1999	1.335257
June 13, 1999	1.335257
June 14, 1999	1.322559
June 15, 1999	1.323067
June 16, 1999	1.307576

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

Ireland pound (continued):

June 17, 1999	$1.311512
June 18, 1999	1.316464
June 19, 1999	1.316464
June 20, 1999	1.316464
June 21, 1999	1.310751
June 22, 1999	1.310751
June 23, 1999	1.309862
June 24, 1999	1.316972
June 25, 1999	1.326622
June 26, 1999	1.326622
June 27, 1999	1.326622
June 28, 1999	1.317099
June 29, 1999	1.312528
June 30, 1999	1.309100

Italy lira:

June 1, 1999	$0.000540
June 2, 1999	.000535
June 3, 1999	.000535
June 4, 1999	.000533
June 5, 1999	.000533
June 6, 1999	.000533
June 7, 1999	.000532
June 8, 1999	.000539
June 9, 1999	.000540
June 10, 1999	.000541
June 11, 1999	.000543
June 12, 1999	.000543
June 13, 1999	.000543
June 14, 1999	.000538
June 15, 1999	.000538
June 16, 1999	.000532
June 17, 1999	.000533
June 18, 1999	.000535
June 19, 1999	.000535
June 20, 1999	.000535
June 21, 1999	.000533
June 22, 1999	.000533
June 23, 1999	.000533
June 24, 1999	.000536
June 25, 1999	.000540
June 26, 1999	.000540
June 27, 1999	.000540
June 28, 1999	.000536
June 29, 1999	.000534
June 30, 1999	.000532

Luxembourg franc:

June 1, 1999	$0.025902
June 2, 1999	.025674
June 3, 1999	.025669
June 4, 1999	.025600
June 5, 1999	.025600
June 6, 1999	.025600
June 7, 1999	.025523
June 8, 1999	.025875

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

Luxembourg franc (continued):

June 9, 1999	$0.025905
June 10, 1999	.025972
June 11, 1999	.026068
June 12, 1999	.026068
June 13, 1999	.026068
June 14, 1999	.025821
June 15, 1999	.025831
June 16, 1999	.025528
June 17, 1999	.025605
June 18, 1999	.025702
June 19, 1999	.025702
June 20, 1999	.025702
June 21, 1999	.025590
June 22, 1999	.025590
June 23, 1999	.025573
June 24, 1999	.025712
June 25, 1999	.025900
June 26, 1999	.025900
June 27, 1999	.025900
June 28, 1999	.025714
June 29, 1999	.025625
June 30, 1999	.025558

Netherlands guilder:

June 1, 1999	$0.474155
June 2, 1999	.469980
June 3, 1999	.469889
June 4, 1999	.468619
June 5, 1999	.468619
June 6, 1999	.468619
June 7, 1999	.467212
June 8, 1999	.473656
June 9, 1999	.474200
June 10, 1999	.475426
June 11, 1999	.477195
June 12, 1999	.477195
June 13, 1999	.477195
June 14, 1999	.472657
June 15, 1999	.472839
June 16, 1999	.467303
June 17, 1999	.468710
June 18, 1999	.470479
June 19, 1999	.470479
June 20, 1999	.470479
June 21, 1999	.468437
June 22, 1999	.468437
June 23, 1999	.468120
June 24, 1999	.470661
June 25, 1999	.474110
June 26, 1999	.474110
June 27, 1999	.474110
June 28, 1999	.470706
June 29, 1999	.469073
June 30, 1999	.467847

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

Portugal escudo:	
June 1, 1999	$0.005212
June 2, 1999	.005166
June 3, 1999	.005165
June 4, 1999	.005151
June 5, 1999	.005151
June 6, 1999	.005151
June 7, 1999	.005136
June 8, 1999	.005206
June 9, 1999	.005212
June 10, 1999	.005226
June 11, 1999	.005245
June 12, 1999	.005245
June 13, 1999	.005245
June 14, 1999	.005195
June 15, 1999	.005197
June 16, 1999	.005137
June 17, 1999	.005152
June 18, 1999	.005172
June 19, 1999	.005172
June 20, 1999	.005172
June 21, 1999	.005149
June 22, 1999	.005149
June 23, 1999	.005146
June 24, 1999	.005174
June 25, 1999	.005211
June 26, 1999	.005211
June 27, 1999	.005211
June 28, 1999	.005174
June 29, 1999	.005156
June 30, 1999	.005143
South Korea won:	
June 1, 1999	$0.000842
June 2, 1999	.000843
June 3, 1999	.000844
June 4, 1999	.000845
June 5, 1999	.000845
June 6, 1999	.000845
June 7, 1999	.000845
June 8, 1999	.000849
June 9, 1999	.000857
June 10, 1999	.000857
June 11, 1999	.000856
June 12, 1999	.000856
June 13, 1999	.000856
June 14, 1999	.000854
June 15, 1999	.000857
June 16, 1999	.000858
June 17, 1999	.000857
June 18, 1999	.000859
June 19, 1999	.000859
June 20, 1999	.000859
June 21, 1999	.000858
June 22, 1999	.000862
June 23, 1999	.000860
June 24, 1999	.000864

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

South Korea won (continued):	
June 25, 1999	$0.000865
June 26, 1999	.000865
June 27, 1999	.000865
June 28, 1999	.000864
June 29, 1999	.000864
June 30, 1999	.000864
Spain peseta:	
June 1, 1999	$0.006280
June 2, 1999	.006225
June 3, 1999	.006223
June 4, 1999	.006207
June 5, 1999	.006207
June 6, 1999	.006207
June 7, 1999	.006188
June 8, 1999	.006273
June 9, 1999	.006281
June 10, 1999	.006297
June 11, 1999	.006320
June 12, 1999	.006320
June 13, 1999	.006320
June 14, 1999	.006260
June 15, 1999	.006263
June 16, 1999	.006189
June 17, 1999	.006208
June 18, 1999	.006231
June 19, 1999	.006231
June 20, 1999	.006231
June 21, 1999	.006204
June 22, 1999	.006204
June 23, 1999	.006200
June 24, 1999	.006234
June 25, 1999	.006279
June 26, 1999	.006279
June 27, 1999	.006279
June 28, 1999	.006234
June 29, 1999	.006213
June 30, 1999	.006196
Taiwan N.T. dollar:	
June 1, 1999	$0.030488
June 2, 1999	.030488
June 3, 1999	.030488
June 4, 1999	.030488
June 5, 1999	.030488
June 6, 1999	.030488
June 7, 1999	.030628
June 8, 1999	.030675
June 9, 1999	.030722
June 10, 1999	.030722
June 11, 1999	.030769
June 12, 1999	.030769
June 13, 1999	.030769
June 14, 1999	.030836
June 15, 1999	.030874
June 16, 1999	.030845

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1999 (continued):

Taiwan N.T. dollar (continued):

June 17, 1999	$0.030902
June 18, 1999	.030893
June 19, 1999	.030893
June 20, 1999	.030893
June 21, 1999	.030303
June 22, 1999	.030902
June 23, 1999	.030864
June 24, 1999	.030883
June 25, 1999	.030855
June 26, 1999	.030855
June 27, 1999	.030855
June 28, 1999	.030902
June 29, 1999	.030950
June 30, 1999	.030950

Dated: July 1, 1999.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 99–54)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: JULY 1, 1999 THROUGH SEPTEMBER 30, 1999

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.666500
Brazil	Real	0.567215
Canada	Dollar	0.680596
China, P.R.	Renminbi yuan	0.120793
Denmark	Krone	0.137589
Hong Kong	Dollar	0.128891
India	Rupee	0.023068
Iran	Rial	N/A
Israel	New Sheqel	N/A
Japan	Yen	0.008265
Malaysia	Ringgit	0.263158

Country	Name of currency	U.S. dollars
Mexico	Peso	$0.106638
New Zealand	Dollar	0.532500
Norway	Krone	0.126358
Philippines	Peso	N/A
Singapore	Dollar	0.588755
South Africa, Republic of	Rand	0.165700
Sri Lanka	Rupee	0.013980
Sweden	Krona	0.117055
Switzerland	Franc	0.637349
Thailand	Baht (tical)	0.027122
United Kingdom	Pound	1.576500
Venezuela	Bolivar	0.001647

Dated: July 1, 1999.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

FEES FOR CUSTOMS SERVICES AT USER FEE AIRPORTS

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This document advises the public of an increase in the fees charged user fee airports by Customs for providing Customs services at these designated facilities. These fees are based on actual costs incurred by Customs in purchasing equipment and providing training and one Customs inspector on a full-time basis, and, thus, merely represent reimbursement to Customs for services rendered. The fees to be increased are the initial fee charged for a user fee airport's first year after it signs a Memorandum of Agreement with Customs to become a user fee airport, and the annual fee thereafter charged user fee airports.

EFFECTIVE DATE: The new fees will be effective on October 1, 1999, and will be reflected in quarterly, user fee airport billings issued on or after that date.

FOR FURTHER INFORMATION CONTACT: Cynthia Sargent, Office of Finance (202–927–9181).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 236 of the Trade and Tariff Act of 1984 (Public Law 98–573, 98 Stat. 2992) (codified at 19 U.S.C. 58b), as amended, authorizes the Secretary of the Treasury to make Customs services available and charge a fee for the use of such services at certain specified airports and at any other airport, seaport, or other facility designated by the Secretary pursuant to specified criteria. (The list of user fee airports is found at § 122.15 of the Customs Regulations (19 CFR 122.15.)) The fee that is charged is an amount equal to the expenses incurred by the Secretary in providing the Customs services at the designated facility, which includes purchasing equipment and providing training and inspectional services, i.e., the salary and expenses of individuals employed by the Secretary to provide the Customs services. The fees being raised are the initial fee charged for a user fee airport's first year after it signs a Memo-

randum of Agreement with Customs to become a user fee airport (set at $105,000 in Fiscal Year 1997), and the annual fee, thereafter, charged user fee airports (set at $78,500 in Fiscal Year 1997).

These user fees for user fee airports are typically set forth in Memorandum of Agreements between a user fee facility and Customs. While the amount of these fees are agreed to be at flat rates, they are adjustable, as costs and circumstances change.

The last notice concerning fees charged user fee airports was published on October 28, 1997, in the Federal Register (62 FR 55846).

ADJUSTMENT OF USER FEE AIRPORT FEES

As of April 30, 1999, Customs has determined that in order for the charged user fee to actually reimburse Customs for services provided, the initial fee is increased from $105,000 to $111,500, and that the recurring annual fee subsequently charged is increased from $78,500 to $80,000. The new fees will be effective October 1, 1999, and will be reflected in quarterly, user fee airport billings issued on or after that date.

Dated: July 2, 1999.

WAYNE HAMILTON,
Assistant Commissioner,
Office of Finance.

[Published in the Federal Register, July 8, 1999 (64 FR 36969)]

EXTENSION OF COMMENT PERIOD FOR PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN SUGAR SYRUPS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of extension of the comment period concerning the proposed revocation of a tariff classification ruling letter and the treatment relating to certain sugar syrups.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, Customs published a notice in the CUSTOMS BULLETIN, Vol. 33, No. 22/23, dated June 9, 1999, advising interested parties that Customs intends to revoke a ruling letter, and any treatment previously accorded by Customs to substantially identical transactions, concerning the classification of certain sugar syrups. Comments were invited on the correctness of the intended actions during a comment period ending on July 9, 1999. This notice advises interested parties that Customs is extending the comment period until the close of business on August 9, 1999.

DATE: Comments must be received on or before August 9, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927–1109.

SUPPLEMENTARY INFORMATION:

BACKGROUND

New York Ruling Letter (NYRL) 810328, dated May 15, 1995, held that a product described as a sugar syrup containing sugar solids, water, and more than 6% of soluble non-sugar solids, was classified in subheading 1702.90.4000, Harmonized Tariff Schedule of the United States (HTSUS), a tariff provision not subject to a tariff rate quota. Customs published a notice in the CUSTOMS BULLETIN, Vol. 33, No. 22/23, dated June 9, 1999, advising interested parties that Customs intends to revoke NYRL 810328 and any treatment previously accorded by Customs to substantially identical transactions.

By this notice, Customs is extending the comment period to the close of business on August 9, 1999.

Dated: July 9, 1999.

JOHN DURANT,
Director,
Commercial Rulings Division.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 7, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO CLASSIFICATION OF MINERAL LABORATORY TEST BAGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letter and treatment relating to the classification of mineral laboratory test bags.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of mineral laboratory test bags and any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before August 27, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Textile Classification Branch, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Rebecca Hollaway, Textile Branch, (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of mineral laboratory bags. Although in this notice Customs is specifically referring to one ruling, New York Ruling Letter (NY) A82032, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer' s reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer s or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of the final decision of this notice.

In NY A82032, dated April 17, 1996, Customs classified mineral laboratory test bags under subheading 6307.90.9989 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). This ruling letter is set forth in "Attachment A" to this document. Since the is-

suance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY A82032, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 962003 *(see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 2, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, April 17, 1996.

CLA–2–63:RR:NC:TP:352 A82032
Category: Classification
Tariff No. 6307.90.9989

MR. F.W. LEWIS
LEGEND, INC.
125 Manuel Street
Reno, NV 89502

Re: The tariff classification of mineral lab test bags from China, Korea, Canada, and Indonesia.

DEAR MR. LEWIS:

In your letter dated March 29, 1996, you requested a tariff classification ruling. The following bags were submitted:

1. The samples marked C–1 style are made of cotton woven fabric and measures 4.5″ x 6″, 10″ x 17″, 6.5″ x 10″ and 12″ x 24″. The bags have a drawstring at the top and an identification tag is attached onto the side for record use.

2. Article numbers 01555, 01565, 01575, and 01578, are constructed of polypropylene spunbonded nonwoven fabric. The bags are in various sizes ranging from 10″ x 17″ to 17″ x 28″ with either a drawstring at the top or a textile woven strap attached onto the side for closure. Also attached is a record tag.

3. Six bags with no identification numbers are made of polyester nonwoven fabric. The bags are in various sizes ranging from 7″ x 12.5″ to 14″ x 28″, also with drawstring at the top and record tag.

4. Tubular shaped bags made of polypropylene woven strips. The strips meet the dimensional requirements for man-made fiber strips contained in Section XI, Legal Note 1 (g) of the Harmonized Tariff Schedule of the United States (HTS). The bags are open at one end and measures 14″ x 28″, 23″ x 38″ and 24″ x 40″.

The applicable subheading for the mineral lab test bags will be 6307.90.9989, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles * * * Other: Other: Other: Other. The rate of duty will be 7 percent ad valorem.

Articles classifiable under subheading 6307.90.9989, HTS, which are products of Indonesia are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations, if the GSP is renewed.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Alan Tytelman at 212–466–5896.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE RH 962003
Category: Classification
Tariff No. 6305.20.0000, 6305.39.0000,
6305.33.0010, and 6305.33.0020

MR. MARK F. LEWIS
LEGEND, INC.
125 Manuel Street
Reno, NV 89502–1118

Re: Revocation of NY A82032; classification of mineral lab test bags; heading 6305; heading 6307; other made up articles; sacks and bags.

DEAR MR. LEWIS:

On April 17, 1996, Customs issued New York Ruling Letter (NY) A82032 to you concerning the classification of mineral lab test bags from China, Korea, Canada and Indonesia. In that ruling, Customs classified all of the bags under subheading 6307.90.9989 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as other made up textile articles.

We have determined that the bags in NY A82032 were not properly classified, and their correct classification is set forth below.

Facts:

In NY A82032 the bags are described as follows:

1. The samples marked C–1 style are made of cotton woven fabric and measures [sic] 4.5″ x 6″, 10″ x 17″, 6.5″ x 10″ and 12″ x 24″. The bags have a drawstring at the top and an identification tag is attached onto the side for record use.

2. Article numbers 01555, 01565, 01575, and 01578, are constructed of polypropylene spunbonded nonwoven fabric. The bags are in various sizes ranging from 10″ x 17″ to 17″ x 28″ with either a drawstring at the top or a textile woven strap attached onto the side for closure. Also attached is a record tag.

3. Six bags with no identification numbers are made of polyester nonwoven fabric. The bags are in various sizes ranging from 7″ x 12.5″ to 14″ x 28″, also with drawstrings at the top and record tags.

4. Tubular shaped bags made of polypropylene woven strips. The strips meet the dimensional requirements for man-made fiber strips contained in Section XI, Legal Note 1(g) of the Harmonized Tariff Schedule of the United States (HTS). The bags are open at one end and measures [sic] 14″ x 28″, 23″ x 38″ and 24″ x 40″.

Issue:

Whether the mineral lab bags are classifiable under heading 6307, HTSUSA, as other made up articles, or under subheading 6305, HTSUSA, as sacks and bags of a kind used for the packing of goods?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

Heading 6305, HTSUSA, provides for sacks and bags, of a kind used for the packing of goods. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the tariff at the international level.

The EN to heading 6305 state in pertinent part:

> This heading covers textile sacks and bags of a kind normally used for the packing of goods for transport, storage or sale.
>
> These articles, which vary in size and shape, include in particular flexible intermediate bulk containers, coal, grain, flour, potato, coffee or similar sacks, mail bags, and small bags of the kind used for sending samples of merchandise by post. The heading also includes such articles as tea sachets.

In Headquarters Ruling Letter (HQ) 958078 dated December 12, 1995, we held that bags used to transport experimental seeds from experimental plots to research facilities and which were discarded after the seeds were evaluated were properly classifiable under heading 6305. Like the bags in HQ 958078, the mineral lab bags in question are used to collect and transport samples to a research facility for analysis. The use of the mineral bags falls within the function described in the EN to heading 6305 for sacks and bags—for the packing of goods for transport, storage or sale. Moreover, in our opinion minerals constitute "goods" for the purposes of heading 6305. Accordingly, the mineral lab bags are classifiable under that heading.

Holding:

NY A82032 is hereby revoked. Style C–1 is classifiable under subheading 6305.20.0000, HTSUSA, which provides for "Sacks and bags, of a kind used for the packing of goods: Of cotton. They are dutiable at the general column one rate of 6.6 percent *ad valorem* and the textile category is 369.

The articles described in paragraphs two and three under the FACTS portion of this ruling are classifiable under subheading 6305.39.0000, HTSUSA, which provides for "Sacks and bags, of a kind used for the packing of goods: Of man-made materials: Other." They are dutiable at the general column one rate of 9 percent *ad valorem* and the textile category is 669.

The bags made of polypropylene woven strips are classifiable, depending on their weight, under subheading 6305.33.0010, HTSUSA, which provides for "Sacks and bags, of a kind used for the packing of goods: Of man-made textile materials: Other, of polyethylene or polypropylene strip or the like: Weighing one kg or more." If the bags weigh less than one kilogram, they are classifiable under subheading 6305.33.0020, HTSUSA, which provides for "Sacks and bags, of a kind used for the packing of goods: Of man-made textile materials: Other, of polyethylene or polypropylene strip or the like: Other." Goods of these subheadings are also dutiable at the general column one rate of 9 percent *ad valorem* and the textile category is 669.

Additionally, please note that although some of the bags will be imported from Canada, as NY A82032 did not address issues under the North American Free Trade Agreement (NAFTA), we will not do so here.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest that the importer check, close to the time of shipment, the Status Report on current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, the importer should contact

the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF "AQUAPEL 364™"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to the tariff classification of "Aquapel 364™."

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling, and any treatment previously accorded by Customs to substantially identical transactions, concerning the tariff classification of the alkyl ketene dimer "Aquapel 364™" under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed revocation was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999.

EFFECTIVE DATE: This notice is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 27, 1999.

FOR FURTHER INFORMATION CONTACT: Michael McManus, General Classification Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out

import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to Customs obligations, a notice of proposed revocation of Headquarters Ruling Letter (HQ) 084942, was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999. No comments were received.

As stated in the proposed notice this revocation action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In HQ 084942, Customs ruled that "Aquapel 364™" was classified under subheading 3809.92.50, HTSUS, as a finishing agent of a kind used in the paper industry. Upon review of this ruling, Customs has discovered an error in the classification of "Aquapel 364™." This product should have been classified in subheading 3404.90.50, HTSUS, as an artificial or prepared wax.

Customs is revoking HQ 084942 to reflect the proper classification of "Aquapel 364™." Proposed Headquarters Ruling Letter (HQ) 962270, revoking HQ 084942, is set forth as the Attachment to this document.

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: July 1, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, July 1, 1999.

CLA-2 RR:CR:GC 962270 MGM
Category: Classification
Tariff No. 3404.90.50

MR. L.L. BARNHART
MANAGER, IMPORTS
TRANSPORTATION DEPARTMENT
HERCULES INCORPORATED
Hercules Plaza
Wilmington, DE 19894

Re: Aquapel 364™; Alkyl Ketene Dimer; HQ 084942 revoked.

DEAR MR. BARNHART:

This is in reference to Headquarters Ruling Letter (HQ) 084942, issued to you September 13, 1989, which modified New York Ruling Letter (NY) 828583, issued to you March 30, 1988. NY 828583 classified the alkyl ketene dimer Aquapel 364™ in subheading 3823.90.40, Harmonized Tariff Schedule of the United States (HTSUS) (1988), as a fatty substance of animal or vegetable origin. HQ 084942 held that Aquapel 364™ was properly classified in subheading 3809.92.50, HTSUS, as a finishing agent of a kind used in the paper industry. Upon review of HQ 084942, Customs has discovered an error in the classification of Aquapel 364™. This ruling sets forth the correct classification of this merchandise and the analysis therefor. A notice of proposed revocation of Headquarters Ruling Letter (HQ) 084942, was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999.

Facts:

According to Customs Laboratory Report 2-98-30036, dated October 20, 1997, and Hercules Inc. publication "Technical Data, Aquapel 364™," Aquapel 364™ is an off-white or light brown waxy solid. It is prepared from long chain fatty acids and used as an ingredient in the production of compounds useful in imparting water repellency to various items.

Issue:

Is Aquapel 364™ an artificial or prepared wax of heading 3404, HTSUS?

Law and Analysis:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise

required, according to the remaining GRIs taken in their appropriate order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs.

Heading 3809 provides as follows:

> Finishing agents, dye carriers to accelerate the dyeing or fixing of dyestuffs and other products and preparations (for example, dressings and mordants), of a kind used in the textile, paper, leather or like industries, not elsewhere specified or included.

Because heading 3809, HTSUS, provides only for merchandise "not elsewhere specified or included," Aquapel 364 ™ is not properly classified in heading 3809 if it is encompassed within any other heading.

Heading 3404, HTSUS, provides for "[a]rtificial waxes and prepared waxes." This heading includes "[c]hemically produced organic products of a waxy character, whether or not water-soluble." Note 5(a), Chapter 34, HTSUS. Aquapel 364 ™ is chemically produced from fatty acids, it is organic (carbon-based), and it has a waxy character, therefore it falls within heading 3404, HTSUS.

Within heading 3404, HTSUS, are three six-digit subheadings: "Of chemically modified lignite," "Of polyethylene glycol," and "Other." Lignite is a "low rank of coal between peat and subbituminous." Hawley, *The Condensed Chemical Dictionary*, 10th edition. Aquapel 364 ™ is not a coal derivative and thus is not of chemically modified lignite. Nor is the merchandise of polyethylene glycol. Polyethylene glycol is a polyether derived from condensation of ethylene glycol, or of ethylene oxide and water, while Aquapel 364 ™ is not an ether and is derived from fatty acids. Thus, the merchandise falls within the residual or "Other" provision. Within this provision are provisions for waxes containing bleached beeswax, and "Other." As Aquapel 364 ™ does not contain bleached beeswax, it is properly classified in the "Other" provision.

Holding:

Aquapel 364 ™ is a prepared wax classified in subheading 3404.90.50, HTSUS.

HQ 084942 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION AND MODIFICATION OF RULING LETTERS AND TREATMENT RELATING TO CLASSIFICATION OF DIETARY SUPPLEMENTS FOR PIGEONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation and modification of classification ruling letters and treatment relating to the classification of dietary supplements for pigeons.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking one ruling letter and modifying another pertaining to the tariff classification of dietary supplements for pigeons and is revoking any treatment previously accorded by the Customs Ser-

vice to substantially identical transactions. Notice of the proposed revocation and modification was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999.

EFFECTIVE DATE: This notice is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 27, 1999.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202–927–1396.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to Customs obligations, a notice of proposed revocation of New York Ruling Letter (NYRL) 886743 and modification of New York Ruling Letter (NYRL) 806484 was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999. No comments were received.

As stated in the proposed notice this modification/revocation action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmo-

nized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In NY 886743, dated June 15, 1993, products commonly referred to as vitamin/mineral supplements for pigeons were determined to be classified in heading 3004, HTSUS, as medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error and that the merchandise is properly classified in heading 2309, HTSUS, as preparations of a kind used in animal feeding.

In NY 806484, dated March 1, 1995, another product commonly referred to as a vitamin/mineral supplement for pigeons was determined to be classified in heading 3004, HTSUS. Since the issuance of that ruling, Customs has had a chance to review the classification of this merchandise and has determined that the classification is in error and that the merchandise is properly classified in heading 2309, HTSUS.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY 886743 and modifying NY 806484 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) 961913 and 962695 (*see* Attachments "A" and "B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: July 2, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 2, 1999.

CLA-2 RR:CR:GC 961913ptl
Category: Classification
Tariff No. 2309.90.9500

MR. CHRIS REINKE
RACING PIGEON BULLETIN
AMERICAN RACING PIGEON NEWS
34 East Franklin Street
Bellbrook, OH 45305

Re: "Natural Vitamineral", "Naturavit Plus", and "Natural Electrolit" products for pigeons; NY 886743 revoked.

DEAR MR. REINKE:

In New York Ruling Letter (NY) 886743, issued to you on June 15, 1993, Customs ruled that certain multi-vitamin/mineral supplements for pigeons, identified as "Natural Vitamineral" and "Naturavit Plus," were classified in subheading 3004.50.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Medicaments * * * consisting of "mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: other medicaments containing vitamins or other products of heading 2936: containing vitamins synthesized wholly or in part from aromatic or modified aromatic industrial organic compounds: other." That ruling also classified a mixture of electrolytes and glucose, identified as "Natural Electrolit," in subheading 3004.90.6003, HTSUS, which provides for "Medicaments * * * consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: other: other: for veterinary use."

Customs has reviewed this ruling and determined that those classifications are incorrect. Therefore, this ruling revokes NY 886743 and sets forth the correct classification of the three products. A notice of proposed revocation of New York Ruling Letter (NYRL) 886743 was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999. No comments were received.

Facts:

The articles are identified as:

"Natural Vitamineral"—a powdered compound of vitaminized minerals for pigeons, containing, among other things, vitamins A, D, B_2, B_{12} and E. The product is described as serving to maintain mineral and vitamin reserves vital to a pigeon's growth, fertility and metabolism. Reportedly, pigeons only ingest this product when they sense a deficiency in their diet. The product will be imported in small cardboard boxes for retail sale.

"Naturavit Plus"—a multi-vitamin liquid complex which "guarantees that the pigeon will receive a balanced supply of the entire range of vitamins, including the following, essential ones:" B_1, D, A, E, and K. The product pamphlet indicates that regular administration protects pigeons against avitaminosis, unbalanced feeding, and will result in maximum racing performances. The product will be imported in plastic bottles for retail sale.

"Natural Electrolit"—a mixture of electrolytes and glucose for "rapid recovery after the flight." The product pamphlet states that this product in an energy-drink which compensates for water and electrolyte depletion and progressively restores acid-base equilibrium. It also represents an immediate energy gain (glucose)), which markedly shortens the recovery period (after races). The product, in powdered form, will be imported put up in sachets for retail sale.

Issue:

What is the classification of nutritional feeding supplements for pigeons?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1,

that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

2309	Preparations of a kind used in animal feeding:
2309.90	Other:
	Other:
	Other:
	Other:
2309.90.9500	Other.
* * * * * * *	
3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale
3004.50	Other medicaments containing vitamins or other products of heading 2936:
3004.50.50	Other.
3004.50.5005	For veterinary use.
3004.90	Other.
3004.90.9090	Other:
3004.90.9003	For veterinary use.

The blend of vitamins and minerals in the products is designed as a dietary supplement for general maintenance of health and well-being of pigeons. There are no claims or indications of usage for the product's being intended for the treatment of any specific condition or ailment. The product is intended to be added to food, not taken to cure or prevent any particular ailment or condition. The concentrations of vitamins and minerals in the mixture are comparatively low and do not reach levels found in therapeutic dosages which are usually only taken under the supervision and direction of a veterinarian.

Chapter 30, HTSUS, covers pharmaceutical products. Of special significance is note 1(a) to chapter 30, which states: "This chapter does not cover: (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters) (section IV)". Chapter notes are part of the legal text of the HTSUS, and are to be considered statutory provisions of law for all purposes. Because the chapter notes are mandatory authority for classification, merchandise described by note 1(a) to chapter 30 is excluded from classification in that chapter.

The exclusion of the instant products from chapter 30 is reinforced by the ENs to heading 30.04 which provides that:

> Further this heading **excludes** food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment.

Inasmuch as these products are intended for animals, we turn to heading 2309, HTSUS, which provides for preparations of a kind used in animal feeding. The ENs to heading 23.09 state that the heading covers preparations designed to provide an animal with all the nutrient elements required to ensure a rational and balanced daily diet. The ENs further provide that the heading includes feeding preparations for birds.

Although the ENs state that vitamins are excluded from heading 23.09, that exclusion does not apply to the carefully blended and prepared mixtures under consideration. Excluded vitamins would be bulk, minimally processed vitamins which have been prepared for general, rather than specific use. The mixture under consideration is a food supplement containing vitamins, not a vitamin. EN 23.09 clearly indicates that the animal food preparations covered therein may contain vitamins (see, *e.g.*, EN 23.09(II)(A)(3), (B)(1), and (C)(1)). The products being classified have been specially mixed and prepared for a highly defined use—the unique dietary and physiological requirements of racing pigeons.

Holding:

The products identified as "Natural Vitamineral", "Naturavit Plus", and "Natural Electrolit" are classified in subheading 2309.90.9095, HTSUS, which provides for: Preparations of a kind used in animal feeding: other: other: other: other: other.

NY 886743 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, July 2, 1999.

CLA–2 RR:CR:GC 962695ptl
Category: Classification
Tariff No. 2309.90.9500

MS. LYNDA L. SCHWAB
RACING PIGEON BULLETIN SUPPLIES
34 East Franklin Street
Bellbrook, OH 45305

Re: "GEM-lytes" products for pigeons; NY 806484 modified.

DEAR MS. SCHWAB:

In New York Ruling Letter (NY) 806484, issued to you on March 1, 1995, Customs classified five products. One of those products, "GEM-lytes", was classified in subheading 3004.90.9003, Harmonized Tariff Schedule of the United States (HTSUS), which provides for medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale: other: other: for veterinary use. We have reviewed that ruling and determined that the classification of that product was incorrect. Accordingly, this letter modifies NY 806484 to correctly classify "GEM-lytes". A notice of the proposed modification of NY 806484 was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999. No comments were received.

Facts:

"GEM-lytes" is a powdered compound containing electrolytes and trace elements in a water soluble form. It contains sulphates of copper, cobalt, iron, manganese, potassium, sodium and zinc on an acidified soluble base. After having been dissolved in liquid, the product is intended to be consumed by pigeons to replace salts lost after training or racing.

Issue:

What is the classification of a nutritional supplement for pigeons?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each head-

ing of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

2309	Preparations of a kind used in animal feeding:
2309.90	Other:
	Other:
	Other:
	Other:
2309.90.9500	Other.
* * * * * * *	
3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale
3004.90.9090	Other:
3004.90.9003	For veterinary use.

The blend of electrolytes and minerals in the product is designed as a tonic supplement for general maintenance of health and well-being of pigeons. There are no claims or indications of usage for the product's being intended for the treatment of any specific condition or ailment. The product is intended to be consumed as part of an overall training regimen, not taken to cure or prevent any particular ailment or condition. The concentrations of vitamins and minerals in the mixture are comparatively low and do not reach levels found in therapeutic dosages which are usually only taken under the supervision and direction of a veterinarian.

Chapter 30, HTSUS, covers pharmaceutical products. Of special significance is note 1(a) to chapter 30, which states: "This chapter does not cover: (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters) (section IV)". Chapter notes are part of the legal text of the HTSUS, and are to be considered statutory provisions of law for all purposes. Because the chapter notes are mandatory authority for classification, merchandise described by note 1(a) to chapter 30 is excluded from classification in that chapter.

The exclusion of the instant product from chapter 30 is reinforced by the ENs to heading 30.04 which provides that:

> Further this heading **excludes** food supplements containing vitamins or mineral salts which are put up for the purpose of maintaining health or well-being but have no indication as to use for the prevention or treatment of any disease or ailment.

These powders have been prepared to supplement the diet of pigeons which have been stressed by rigorous training and racing. This product is a restorative tonic, a "Gatorade®" for birds, and is not offered for sale with the expectation that it will be taken for therapeutic or prophylactic purposes.

Inasmuch as this product is intended for animals, we turn to heading 2309, HTSUS, which provides for preparations of a kind used in animal feeding. The ENs to heading 23.09 state that the heading covers the type of preparations such as the one under consideration here which has been designed to provide a racing pigeon with all the nutrient elements required to ensure a healthful and balanced daily diet. The ENs further provide that the heading includes feeding preparations for birds. As such, "GEM-lytes" clearly fall within the scope of preparations covered in heading 2309, HTSUS, as a preparation of a kind used in animal feeding.

Holding:

For the reasons stated above, the product identified as "GEM-lytes" is classified in subheading 2309.90.9095, HTSUS, which provides for: Preparations of a kind used in animal feeding: other: other: other: other: other.

NY 806484 is modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 14, 1999.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

PROPOSED MODIFICATION OF RULING LETTERS AND TREATMENT CONCERNING THE ELIGIBILITY OF FLATWARE SETS FOR A DUTY EXEMPTION PURSUANT TO THE GENERALIZED SYSTEM OF PREFERENCES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letters and treatment relating to the duty-free eligibility of flatware sets under the Generalized System of Preferences ("GSP").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two New York Ruling Letters, and any treatment previously accorded by Customs to substantially identical transactions, pertaining to the eligibility of flatware sets for duty-free treatment under GSP. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before August 27, 1999.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Special Classification and Marking Branch, (202) 927–2310.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify two rulings concerning the eligibility of imported flatware sets for a duty exemption pursuant to GSP. Although in this notice Customs is specifically referring to two rulings, New York Ruling Letters (NY) C88961, dated July 8, 1998, and NY D85020, dated December 11, 1998, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to those identified. No further rulings have been found. This notice will cover any rulings on the merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to modify any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States ("HTSUS").

Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision of this notice.

In NY C88961 and NY D85020, which are set forth as Attachments A and B, respectively, to this document, Customs determined, in part, that flatware sets from Thailand classified in subheading 8215.20.0000, HTSUS, are eligible for duty-free treatment under the GSP. Since the issuance of these rulings, Customs has had a chance to review this GSP eligibility issue and has determined that flatware sets classified in the above provision are not GSP eligible articles.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY C88961 and NY D85020, and any other ruling not specifically identified, to reflect the proper GSP duty treatment of flatware sets classified in subheading 8215.20.0000, HTSUS, pursuant to the analysis set forth in Proposed Headquarters Ruling Letters (HQ) 561315 (see "Attachment C" to this document) and HQ 561440 (see "Attachment D" to this document).

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to modify any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 12, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 8, 1998.

CLA-2-73:RR:NC:1:115 C88961
Category: Classification
Tariff No. 8215.2000/8211.92.4060

MR. PETER WEINRAUCH
IMPORT COMMODITY GROUP LTD.
Hook Creek Blvd. & 145 th Avenue
Bld. A5
Valley Stream, NY 11582

Re: The tariff classification a flatware set from Thailand.

DEAR MR. WEINRAUCH:

In your letter dated June 05, 1998 you requested a tariff classification, on behalf of your client Excel Importing Corp.

The sample you have submitted, Faberware Colours 20 piece service for four, is a stainless steel flatware set. It consists of 4 salad forks, 4 dinner forks, 4 dinner knaves place spoons and four teaspoons. All of the flatware pieces have black plastic handles

The applicable subheading for the flatware set will be 8215.20.0000/8211.91.5060, Harmonized Tariff Schedule of the United States (HTS), which provides for [other sets of assorted articles/[t]able knives having fixed blades with rubber or plastic handles: other. The duty rate will be 0.8 cents each plus 4.1% ad valorem.

Articles classifiable under subheading 8215.20.0000, HTS, which are products of Thailand are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations. However, the GSP expired June 30,1998 and has not been extended. Congress may choose to renew GSP retroactively. In that case, the GSP provision cited herein may apply retroactively.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212–466–5487.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, December 11, 1998.

CLA–2–73:RR:NC:MM: 113 D85020
Category: Classification
Tariff No. 7323.93.0080(EN), 8211.91.5060(EN), 8215.20.0000(EN), and 8215.99.2000(EN)

MR. ROBERTO COLON
ELEVEN ELEVEN CORPORATION
P.O. Box 305
Catano, PR 00963–0305

Re: The tariff classification of flatware from Thailand.

DEAR MR. COLON:

In your letter dated November 25, 1997, you requested a tariff classification ruling.

The merchandise is knives, forks, and spoons designed for use by young children. The first style of flatware consists of stainless steel spoons having plastic-coated bowls (item number 204). The spoons do not have any working edges, working surfaces or other working parts of base metal.

The applicable subheading for the plastic-coated spoons will be 7323.93.0080(EN), Harmonized Tariff Schedule of the United States (HTS), which provides for table, kitchen or other household articles, other, of stainless steel, other. The duty rate will be 2.3 percent ad valorem. Effective January 1, 1999, the rate of duty will be 2 percent ad valorem.

Articles classifiable under subheading 7323.93.0080(EN), HTS, which are products of Thailand are entitled to duty free treatment under the Generalized System of Preferences *(GSP)* upon compliance with all applicable regulations.

Item number 206 is a 3-piece flatware set consisting of a knife, fork, and spoon made of stainless steel with white plastic handles. The handles are decorated with cartoon-like characters and heart-shaped balloons. The flatware set is retail packed on a blister card.

The applicable subheading for the 3-piece flatware set (item number 206) will be 8215.20.0000(EN), Harmonized Tariff Schedule of the United States (HTS), which provides for spoons, forks, ladles, skimmers, cake-servers, fish knives, buffer knives, sugar tongs and similar kitchen or tableware, other *sets* of assorted articles. The set will be dutiable at the rate of duty applicable to that article in the set subject to the highest rate of duty. In this case the rate of duty of the knife, 0.8 cent each plus 4.1 percent ad valorem under 8211.91.5060(EN), will be the highest and will therefore apply to the whole set. The specific rate of duty, 0.8 cent, is assessed on each piece in the set. Effective January 1, 1999, the rate of duly will be 0.7 cent each plus 3.7 percent ad valorem.

Articles classifiable under subheading 8211.91.5060(EN), HTS, which are products of Thailand are entitled to duty free treatment under the Generalized System of Preferences (*GSP*) upon compliance with all applicable regulations.

Item number 207 is a 2-piece flatware set containing a fork and a spoon made of stainless steel with white plastic handles. The handles are ornamented with pictures of bunnies on swings. The fork and spoon are packaged for retail sale on a blister card.

The applicable subheading for the 2-piece flatware set (item number 207) will be 8215.20.0000(EN), Harmonized Tariff Schedule of the United States (HTS), which provides for spoons, forks, ladles, skimmers, cake-servers, fish knives, butter knives, sugar tongs and similar kitchen or tableware, other *sets* of assorted articles. The set will be dutiable at the rate of duty applicable to that article in the set subject to the highest rate of duty. In this case the of duly of the fork, 0.5 cent each plus 3.2 percent ad valorem under 8215.99.2000(EN), will be the highest and will therefore apply to the whole set. The specific rate of duty, 0.5 cent, is assessed on each piece in the set. In 1999, the raw of duty will remain unchanged,

Articles classifiable under subheading 8215.99.2000(EN), HTS, which are products of Thailand arc entitled to duty free treatment under the Generalized System of Preferences (*GSP*) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist James Smyth at 212–466–2084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–02 RR:CR:SM 561315 KSG
Category: Classification

PETER WEINRAUCH
IMPORT COMMODITY GROUP LTD.
Hook Creek Blvd. & 145th Avenue
Bld. A5
Valley Stream, NY 11582

Re: Modification of classification principle set forth in NY C88961; Eligibility under the Generalized System of Preferences of flatware sets classified in subheading 8215.20.0000, HTSUS; sets.

DEAR MR. WEINRAUCH:

This is is regard to NY ruling C88961 that was issued to you on July 8, 1998, which addresssed the classification of flatware sets. We have reviewed this ruling in light of a matter currently before us on identical merchandise and have determined that NY ruling letter C88961 is incorrect with regard to the issue of GSP eligibility. Therefore, this ruling modifies NY C88961 and sets forth the correct duty treatment for the flatware sets.

Facts:

This case involves flatware sets (knives, forks, spoons, and teaspoons with plastic handles) imported from Thailand by Excel Importing Corp. The flatware sets were classified under subheading 8215.20.00/ 8211.91.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as the knives had the highest rate of duty in the set.

Customs determined that the flatware sets were entitled to duty free treatment under the Generalized System of Preferences ("GSP") upon compliance with all applicable regulations.

Issue:

Whether the imported flatware sets are eligible for duty-free treatment under the GSP.

Law and Analysis:

Under the GSP, eligible articles the growth, product or manufacture of a designated beneficiary developing country (BDC) which are imported directly into the customs territory of the U.S. from a BDC may receive duty-free treatment if the sum of (1) the cost or value of materials produced in the BDC, plus (2) the direct costs of the processing operations performed in the BDC, is equivalent to at least 35 percent of the appraised value of the article at the time of entry into the U.S. *See* 19 U.S.C. 2463(a).

General Note 3(a)(iii), HTSUS, provides, in pertinent part, as follows:

> The "*Special*" subcolumn reflects rates of duty under one or more special tariff treatment programs described. * * * These rates apply to those products which are properly classified under a provision for which a special rate is indicated and for which all of the legal requirements for eligibility for such program or programs have been met. * * * Where no special rate of duty is provided for a provision, or where the country from which a product otherwise eligible for special treatment was imported is not designated as a beneficiary country under a program appearing with the appropriate provision, the rates of duty in the "General" subcolumn of column 1 shall apply.

Articles from Thailand classified in a provision for which a rate of duty of "Free" appears in the "special" subcolumn followed by the symbol "A" or "A*" are eligible articles for purposes of the GSP. *See* General Note 3(c)(i) and 4(c), HTSUS.

The flatware sets are classified in subheading 8215.20.0000, HTSUS, which provides for "spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: * * * Other sets of assorted articles." The "General" subcolumn states that the applicable duty rate is "[t]he rate of duty applicable to that article in the set subject to the highest rate of duty."

With respect to the eligibility of the sets for GSP treatment, the "Special" subcolumn of subheading 8215.20.00, HTSUS, provides, in pertinent part, as follows: "Free (CA, E, IL, J)." As this provision does not include the symbol "A" or "A*," we have determined that the flatware sets are ineligible for GSP treatment.

In Treasury Decision 91–7, dated January 8, 1991, Customs stated the following regarding the eligibility of sets for special tariff treatment programs:

> If the "Special" subcolumn opposite the subheading under which the set is classified contains a special duty rate, then the entire set would be entitled to that special rate, assuming compliance with the program's legal requirements. * * * However, where no such duty rate is indicated for that subheading, the entire set would be ineligible for the tariff preference program, even though items in the set * * * would be eligible if classified separately.

The flatware sets involved in this case are classified in subheading 8215.20.00, HTSUS. Therefore, it is this provision which is controlling in determining whether the sets are GSP eligible. The fact that the article in the set subject to the highest rate of duty is described in a GSP-eligible provision is irrelevant to a determination of the GSP eligibility of the set. Neither the set nor any individual item in the imported set is "classified" in this provision. The knives in the instant case, for example, would be classified in subheading 8211.91.50, HTSUS (and thus would be eligible for GSP treatment), only if imported separately from the set. Therefore, we conclude that the flatware sets in this case are ineligible for GSP treatment.

Holding:

The imported flatware sets, which are classified in subheading 8215.20.0000, HTSUS, are ineligible for duty free treatment under the GSP.

NY C88961, dated July 8, 1998, is hereby modified to the extent that it is inconsistent with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–02 RR:CR:SM 561440 KSG
Category: Classification

ROBERTO COLON
ELEVEN ELEVEN CORPORATION
P.O. Box 305
Catano, PR 00963–0305

Re: Modification of classification principles set forth in NY D85020; Eligibility under the Generalized System of Preferences of flatware sets classified in subheading 8215.20.0000, HTSUS; sets.

DEAR MR. COLON:

This is in regard to NY ruling letter D85020 that was issued to you on December 11, 1998, which addressed the classification of flatware sets. We have reviewed this ruling in light of a matter currently before us on identical merchandise and have determined that NY ruling letter D85020 is incorrect with regard to the issue of GSP eligibility. Therefore, this ruling modifies NY D85020 and sets forth the correct duty treatment for the flatware sets.

Facts:

This case involves a three-piece flatware set (knife, fork, and spoon), and a two-piece set (fork and spoon) imported from Thailand. The three-piece flatware set was classified under subheading 8215.20.00/8211.91.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as the knife had the highest rate of duty in the set. The two-piece set was classified under subheading 8215.20.00/8215.99.20, as the fork had the highest rate of duty in the set.

Customs determined that the flatware sets were entitled to duty-free treatment under the GSP upon compliance with all applicable regulations.

Issue:

Whether the imported flatware sets are eligible for duty-free treatment under the GSP.

Law and Analysis:

Under the GSP, eligible articles the growth, product or manufacture of a designated beneficiary developing country (BDC) which are imported directly into the customs territory of the U.S. from a BDC may receive duty-free treatment if the sum of (1) the cost or value of materials produced in the BDC, plus (2) the direct costs of the processing operations performed in the BDC, is equivalent to at least 35 percent of the appraised value of the article at the time of entry into the U.S. *See* 19 U.S.C. 2463(a).

General Note 3(a)(iii), HTSUS, provides, in pertinent part, as follows:

> The "*Special*" subcolumn reflects rates of duty under one or more special tariff treatment programs described. * * * These rates apply to those products which are properly classified under a provision for which a special rate is indicated and for which all of the legal requirements for eligibility for such program or programs have been met. * * * Where no special rate of duty is provided for a provision, or where the country from which a product otherwise eligible for special treatment was imported is not designated as a beneficiary country under a program appearing with the appropriate provision, the rates of duty in the "General" subcolumn of column 1 shall apply.

Articles from Thailand classified in a provision for which a rate of duty of "Free" appears in the "special" subcolumn followed by the symbol "A" or "A*" are eligible articles for purposes of the GSP. *See* General Note 3(c)(i) and 4(c), HTSUS.

The flatware sets are classified in subheading 8215.20.0000, HTSUS, which provides for "spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: * * * Other sets of assorted articles." The "General" subcolumn states that the applicable duty rate is "[t]he rate of duty applicable to that article in the set subject to the highest rate of duty."

With respect to the eligibility of the sets for GSP treatment, the "Special" subcolumn of subheading 8215.20.00, HTSUS, provides, in pertinent part, as follows: "Free (CA, E, IL,

J)." As this provision does not include the symbol "A" or "A*," we have determined that the flatware sets are ineligible for GSP treatment.

In Treasury Decision 91–7, dated January 8, 1991, Customs stated the following regarding the eligibility of sets for special tariff treatment programs:

> If the "Special" subcolumn opposite the subheading under which the set is classified contains a special duty rate, then the entire set would be entitled to that special rate, assuming compliance with the program's legal requirements. * * * However, where no such duty rate is indicated for that subheading, the entire set would be ineligible for the tariff preference program, even though items in the set * * * would be eligible if classified separately.

The flatware sets involved in this case are classified in subheading 8215.20.00, HTSUS. Therefore, it is this provision which is controlling in determining whether the sets are GSP eligible. The fact that the article in the set subject to the highest rate of duty is described in a GSP-eligible provision is irrelevant to a determination of the GSP eligibility of the set. Neither the set nor any individual item in the imported set is "classified" in this provision. The knives in the three-piece set, for example, would be classified in subheading 8211.91.50, HTSUS (and thus would be eligible for GSP treatment), only if imported separately from the set. Therefore, we conclude that the flatware sets in this case are ineligible for GSP treatment.

Holding:

The imported flatware sets, which are classified in subheading 8215.20.0000, HTSUS, are ineligible for duty free treatment under the GSP.

NY D85020, dated December 11, 1998, is hereby modified to the extent that it is inconsistent with this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF CUSTOMS RULING LETTER AND TREATMENT CONCERNING THE ELIGIBILITY OF BAG GRIPPERS FOR A DUTY EXEMPTION PURSUANT TO SUBHEADING 9817.00.96, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and the treatment relating to the duty-free eligibility of bag grippers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter and any treatment previously accorded by Customs to substantially identical transactions, pertaining to the tariff classification and duty treatment of a bag gripper under the Harmonized Tariff Schedule of the United States (HTSUS).

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 27, 1999.

FOR FURTHER INFORMATION CONTACT: Karen S. Greene, Special Classification and Marking Branch, (202) 927–2310.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), notice of the proposed revocation of HQ 560531 was published on June 9, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 22/23. No comments were received in response to the notice.

As stated in the proposed notice, this revocation action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise/issue covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In Headquarters Ruling Letter (HQ) 560531, dated June 2, 1998, Customs ruled on whether "bag grippers" imported from Ireland were eligible for a duty exemption pursuant to subheading 9817.00.96, Harmonized Tariff Schedule of the United States (HTSUS). "Bag grippers," also known as outlet port clamps, are used by persons with End Stage Renal Disease during continuous ambulatory peritoneal dialysis. Subheading 9817.00.96, HTSUS, provides duty-free treatment for imported articles for the use or benefit of handicapped persons. There is a requirement in the superior text of subheading 9817.00.92, HTSUS, that the articles must be specially designed or adapted for the use or benefit of the blind, or other physically or mentally handicapped persons. In HQ 560531, Customs determined that the bag grippers were not specially designed or adapted for the use or benefit of handicapped persons as asserted by counsel for the importer of the bag grippers, Baxter Healthcare Corporation. Customs made that determination because we were not satisfied, based on the information submitted at that time, that the bag grippers were dedicated to use by ESRD patients rather than items with a more general medical application. On the basis of additional information submitted, Customs finds that the bag grippers are specially designed or adapted for the use or benefit of handicapped persons and are eligible for duty free treatment under subheading 9817.00.96, HTSUS.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking HQ 560531, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 561226 (see "Attachment " to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

Dated: July 12, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, July 12, 1999.
MAR–2 RR:CR:SM 561226 KSG
Category: Classification

MARK S. ZOLNO
KATTEN MUCHIN & ZAVIS
525 West Monroe Street
Suite 1600
Chicago, IL 60661

Re: Revocation of principle set forth in HQ 560531; subheading 9817.00.96; bag gripper.

DEAR MR. ZOLNO:

This is in reference to Headquarters Ruling Letter ("HQ") 560531, that was issued to the Port Director of Customs, Chicago, Illinois, on June 2, 1998, which decided Protest No. 3901–96–101814 addressing the denial of duty-free treatment under subheading 9817.00.96, of the Harmonized Tariff Schedule of the United States ("HTSUS"), to bag grippers imported by Baxter Healthcare Corporation. We have reviewed this ruling in light of substantial additional information submitted by you on behalf of Baxter Healthcare Corporation in a conference held at Headquarters on April 7, 1999, and a letter dated May 3, 1999, and have determined that HQ 560531 is incorrect. Therefore, this ruling revokes HQ 560531 and sets forth the correct classification for the bag gripper. This action has no effect upon the decision in Protest No. 3901–96–101814.

Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), notice of the proposed revocation of HQ 560531 was published on June 9, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 22/23. No comments were received in response to this notice.

Facts:

The imported article is a bag gripper (also known as an outlet port clamp) used in continuous ambulatory peritoneal dialysis ("CAPD"). The bag grippers are imported from Ireland by Baxter Healthcare Corporation who designed it for use by CAPD patients who have lost most or all of their normal kidney function. It is a blue single-molded plastic clamp, about 2½ inches long and ¾ inches wide, which opens and closes. Samples were provided.

Patients who have lost most or all of their normal kidney function, whether by disease or trauma, are referred to as having End Stage Renal Disease ("ESRD"). You state that about 30–40 percent of such patients suffered kidney damage as a result of diabetes. Diabetes also often causes blindness, heart failure and severe circulatory failure. There are only two treatments for ESRD patients—transplant or dialysis.

There are two forms of medical dialysis. Dialysis is performed by simple diffusion of toxins and excess fluids that are built up in the blood across a semipermeable membrane into a dialysis fluid, or dialysate, which is then discarded. In the first method of dialysis, classical hemodialysis, a patient goes to a clinic three or four times a week, every week, and has his or her blood dialyzed.

The other method of dialyzing an ESRD patient is peritoneal dialysis. In peritoneal dialysis the peritoneal membrane, *i.e.*, the membrane lining the peritoneal cavity, serves as the semipermeable membrane across which dialysis, or diffusion, takes place. The imported bag grippers are used exclusively in peritoneal dialysis.

A catheter is surgically implanted into the peritoneum through the skin and the end protruding to the outside is fitted with a threaded connector generally made of titanium and covered by a cap containing an antiseptic. Dialysate is drained into the peritoneal space via the catheter, allowed to dwell there for about four hours, during which time toxins, excess water and other waste products diffuse across the membrane to the dialysate, and the used, or spent, dialysate is drained out, again via the catheter, and discarded.

This drain and fill procedure is either performed by the patient manually, which is known as CAPD, or by machine while the patient sleeps.

You state that Baxter designed the bag gripper in response to patient need. Each time a patient connects or disconnects their catheter to a bag of dialysate, there is an opportunity for contamination by touch and infection. Peritonitis, often caused by improper exposure of the open end of the catheter to microorganisms, is one of the most common causes for hospitalization of CAPD patients. During treatment for peritonitis, patients are often re-

quired to have a fistula surgically implanted in an artery/vein pair in the arm and continue dialysis by conventional hemodialysis.

Before the bag gripper was introduced in 1980, CAPD patients were required to connect an extension tube set (called a "transfer set") to their catheter connector. Many patients, especially those who are diabetic, had great difficulty with the disconnect/connect operation. They had trouble making the proper connection because: 1) their pinch or grip strength was severely limited; 2) they had trouble seeing the new white plastic port and inserting the white plastic spike into the port due to their relative blindness and diabetic retinopathy, which also causes varying degrees of color blindness; and 3) once they got the spike to the mouth of the port, they did not have the grip strength to either hold it straight or force it through the septum in the port.

CAPD patient needs identified were: 1) sufficient mechanical advantage (*i.e.* lever action) to achieve a grip force on the bag port that would hold it steady; 2) keeping the port from twisting during the spiking procedure; 3) very precise clamping force and dimensions (tolerances of 0.002 inches) (ex. precisely dimensioned splines or ridges inside the clamp jaws); 4) supporting the side walls of the port to prevent accidental puncture; 5) providing maximum color contrast between port and clamp for legally blind or color blind patients or those suffering from diabetic retinopathy; and 6) avoiding inadvertent touch contamination. The bag gripper took approximately two man-years of effort by a team of people with an expertise in a variety of areas to successfully design what appears to be a "simple" plastic clamp to meet all of the above needs. The team included experts in ergonomics, mechanical engineers, materials experts, and mechanical and manufacturing engineers.

You explained in your submission that the bag gripper is not suitable for other medical uses. For instance, with regard to the IV application, the bag gripper could not be used because 1) the two clamp positions, open and closed, would not be adjustable for varying flow rates; 2) the size of the tubes and ports involved in CAPD are quite large compared to IV tube sets; and 3) the port clamps have to be much stronger for CAPD than for IV. You note that Baxter, which is a leading supplier of IV bags and systems, does not offer or suggest the use of the bag grippers for use with an IV set or bag.

Issue:

Whether the imported CAPD bag grippers are eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

Law and Analysis:

The Agreement on the Importation of Educational, Scientific and Cultural Materials, known as the Florence Agreement, is an international agreement drafted by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and adopted by it in Florence, Italy, in July 1950 (17 UST 1835; TIAS 6129).

It provides for duty-free treatment and the reduction of trade obstacles for imports of educational, scientific, and cultural materials in the interest of facilitating the international free flow of ideas and information. Materials falling within the coverage of the Florence Agreement include: books, publications and documents; works of art and collector's pieces; visual and auditory materials; scientific instruments and apparatus; and articles for the blind.

The Nairobi Protocol to the Florence Agreement on the Importation of Educational, Scientific, and Cultural Materials Act of 1982 expanded the scope of the Florence Agreement primarily by expanding duty-free treatment for certain articles for the use or benefit of the handicapped in addition to providing duty-free treatment for articles for the blind. The 97th Congress passed Pub. L. 97–446 to ratify the Nairobi Protocol in the U.S. The Senate stated in its Report that one of the goals of this law was to benefit the handicapped and show U.S. support for the rights of the handicapped. The Senate, however, did state that it did not intend "that an insignificant adaptation would result in duty-free treatment for an entire relatively expensive article * * * the modification or adaptation must be significant so as to clearly render the article for use by handicapped persons." S. Rep. No. 97–564, 97th Cong. 2nd Sess. (1982). The Senate was concerned that persons would misuse this tariff provision to avoid paying duties on expensive products.

Section 1121 of the Omnibus Trade and Competitiveness Act of 1988 and Presidential Proclamation 5978 provided for the implementation of the Nairobi Protocol by inserting permanent provisions, subheadings 9817.00.92, 9817.00.94, and 9817.00.96 into the HTSUS. These tariff provisions specifically state that "articles specifically designed or

adapted for the use or benefit of the blind or other physically or mentally handicapped persons" are eligible for duty-free treatment.

U.S. Note 4(a), Chapter 98, HTSUS ("U.S. Note 4(a)"), states that the term "blind or other physically or mentally handicapped persons" includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working.

U.S. Note 4(b), Chapter 98, HTSUS ("U.S. Note 4(b)"), states that subheadings 9817.00.92, 9817.00.94 and 9817.00.96 do not cover (i)articles for acute or transient disability; (ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled; (iii) therapeutic and diagnostic articles; or (iv) medicine or drugs.

People who suffer from kidney failure are considered "handicapped." *See Travenol Laboratories, Inc. v. United States*, 813 F. Supp. 840 (CIT 1993), and HRL 559120, dated October 20, 1995. Customs ruled in HRL 556090, dated November 8, 1991, that individuals who suffer from chronic arthritis, scoliosis, severe hernia problems and post-polio syndrome and who need heavy-duty support corsets are "handicapped" within the meaning of this provision because without the corsets, they are substantially limited in their ability to walk and perform manual tasks. Individuals who suffer from chronic incontinence are considered "handicapped" because this condition can interfere with working. *See* HRL 960056, dated January 30, 1997.

The first issue is whether the bag grippers are precluded from treatment under subheading 9817.00.96, HTSUS, by U.S. Note 4(b)(i), which excepts from duty-free treatment articles for acute or transient disabilities. Clearly, CAPD patients suffer from a disability (End Stage Renal Disease) that is neither acute nor transient. Accordingly, we find that the bag grippers are not articles for acute or transient disabilities.

The second issue is whether the bag grippers involved in this case are "specially designed or adapted" for the use or benefit of handicapped persons, which is required by the superior text in subheading 9817.00.96, HTSUS.

The meaning of the phrase "specially designed or adapted" has been decided on a case-by-case basis. In HRL 556449, dated May 5, 1992, Customs set forth factors it would consider in making this case-by-case determination. These factors include: 1) the physical properties of the article itself, *i.e.*, whether the article is easily distinguishable, by properties of the design, form, and the corresponding use specific to this unique design, from articles useful to non-handicapped persons; 2) whether any characteristics are present that create a substantial probability of use by the chronically handicapped so that the article is easily distinguishable from articles useful to the general public and any use thereof by the general public is so improbable that it would be fugitive; 3) whether articles are imported by manufacturers or distributors recognized or proven to be involved in this class or kind of articles for the handicapped; 4) whether the articles are sold in specialty stores which serve handicapped individuals; and 5) whether the condition of the articles at the time of importation indicates that these articles are for the handicapped.

In this case, we have examined the information submitted by Baxter and find that Baxter has shown that the bag grippers have distinctive design features, and characteristics for their intended use by CAPD patients which are fully set forth *infra*. For example, we now agree that the construction of the bag grippers is specifically designed to prevent contamination when a patient connects or disconnects their catheter to a bag of dialysate. Baxter explained the special needs of CAPD patients and the two man-year design process involving various experts that it took to develop the bag grippers. These features easily distinguish them from articles useful to the general public so that any use thereof by the general public would be so improbable that it would be fugitive. Further, the bag grippers are sold by Baxter Healthcare, a corporation that sells products for people with disabilities and to hospitals and medical professionals. Accordingly, we find that the bag grippers are specially designed or adapted for the use or benefit of handicapped persons and are eligible for duty free treatment under subheading 9817.00.96, HTSUS.

Holding:

The imported CAPD bag grippers are eligible for duty free treatment under subheading 9817.00.96, HTSUS.

HQ 560531 dated June 2, 1998, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF METAL PARTS OF FILING SYSTEMS DESIGNED TO BE USED TO STORE OVERSIZED PAPER DOCUMENTS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to classification of metal parts of filing systems designed to be used to store oversized paper documents.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of metal parts of filing systems designed to be to used to store oversized paper documents. Similarly, Customs is revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed revocation was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999.

EFFECTIVE DATE: This notice is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 27, 1999.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 927–2318.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility.**" These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accord-

ingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met. Pursuant to Customs obligations, a notice of proposed revocation of New York Ruling Letter (NY) C88471 was published in Vol. 33, No. 21 of the CUSTOMS BULLETIN dated May 26, 1999. One comment was received.

As stated in the proposal notice, this revocation action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In New York Ruling Letter (NY) C88471, dated June 18, 1998, metal parts of filing systems designed to be used for the filing and storage of oversized paper documents were classified in subheading 8304.00.00, HTSUS, as desk top filing or card-index cabinets, paper trays, paper rests, pen trays, office-stamp stands and similar office or desk equipment of base metal. In HQ 962366, attached to the proposal notice, the separately imported metal parts were to be classified as brackets and similar fittings of base metal of subheading 8302.50.00, HTSUS, or binder, paper or letter clips of base metal of subheading 8305.90.60, HTSUS. In response to the comment received in response to the notice of proposed revocation, Customs has determined that the metal clamps are classified in subheading 8305.10.00, HTSUS, as fittings for looseleaf

binders or files, instead of subheading 8305.90.60, HTSUS, the so-called "basket" provision, as proposed in the notice.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY C88471, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed HQ 962366 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will be come effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: July 12, 1999.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, July 12, 1999.

CLA–2 RR:CR:GC 962366 AML
Category: Classification
Tariff Nos. 8302.50.00 and 8305.10.00

MR. GORDON C. ANDERSON
C.H. ROBINSON INTERNATIONAL
5995 Opus Parkway
Minnetonka, MN 55343–9058

Re: Reconsideration of NY C88471; Base metal racks and clamps for storage and filing.

DEAR MR. ANDERSON:

In a letter dated October 21, 1998, you requested, on behalf of Safeco Products Co., a subsidiary of Liberty Diversified Industries, reconsideration of New York Ruling Letter (NY) C88471, issued to you on June 18, 1998, concerning the classification of metal parts of filing systems designed for storage of oversized paper documents, under the Harmonized Tariff Schedule of the United States (HTSUS). Samples, brochures and literature were submitted for our review.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NY C88471 was published on May 26, 1999, in the CUSTOMS BULLETIN, Volume 33, Number 21. One comment was received in response to this notice.

Facts:

The subject articles, which are parts of filing systems used to file and store oversized paper documents such as blueprints, drawings and plans produced and used by architects, engineers, draftspersons and contractors, are described as follows:

Item # 5030, a "Drop Lift Wall Rack," consists of two triangular, metal brackets which form right angles and measure 7 3/4 inches by 11 1/8 inches. The face of the 7 3/4 inch portion is 1 1/2 inches wide and has prefabricated screw holes for affixing the bracket to a wall.

The 11 1/8 inch long portion is 7/16 of an inch wide and is prefabricated with a stop tab and plastic end cap fitting on the end furthest from section which affixes to the wall. The brackets are used in a "Vertical Wall Hanging System." The brackets are designed to be affixed to the wall and spaced dependent upon the size of "Vertical Hanging Clamps" to be used with the brackets. The clamps hold the sheets and rest upon the brackets. The brackets will accommodate up to 12 clamps and sheets.

Item # 5016, a "Pivot Wall Rack," consists of a metal rack designed to be affixed to a wall and hold 12 pivoting, metal brackets. The metal base measures 24 inches by 9 9/16 inches and is 1 inch in depth. The pivoting brackets are triangular in shape and measure 14 x 16 x 8 with metals tips prefabricated to fit within prefabricated holes in the metal bracket. This item functions similarly to item # 5030 above, except this item has the pivot feature. The brackets will accommodate up to 12 clamps and sheets.

Item # 5010, is a bracket which is identical to item # 5016, above, except that item # 5010 holds "data files" (item # 5028).

Item # 5001–6, a "Vertical Hanging Clamp," is an aluminum clamp with plastic wing knobs, molded plastic hangers/end caps, and a snap on plastic label holder. The clamps vary in manufactured length from 18 to 42 inches and hold up to 100 individual sheets. The wing nuts tighten and loosen the clamps, as desired. The plastic end caps are designed to hold the clamps in place on any of the wall racks or filing systems produced by the manufacturer.

Item # 4303–6, a "Print-Lock Hanging Clamp," is a sturdier version of item # 5001–6, with heavier grade wing knobs made of chrome-plated alloy, and a variable tension mounting clip which is also constructed of metal. The clamps vary in manufactured length from 18 to 42 inches and hold up to 100 individual sheets. The end caps are designed to hold the clamps in place on any of the wall racks or filing systems produced by the manufacturer.

The individual groups of articles are separately imported, packaged and itemized, such that, for example, racks are imported in one shipment and the clamps are imported in another shipment.

Issue:

Whether the metal parts (racks and clamps) of filing systems designed for filing and storage of oversized paper documents are classifiable within subheading 8302.50.00, HTSUS, which provides for mountings, fittings and similar articles of base metal; subheading 8304.00.00, HTSUS, which provides for desk-top filing or card-index cabinets * * * and similar office or desk equipment * * * of base metal, other than office furniture of heading 9403; subheading 8305.10.00, HTSUS, which provides for fittings for looseleaf binders or files of base metal; subheading 8305.90.60, HTSUS, which provides for other fittings for files, letter clips, paper clips and similar articles of base metal; or subheading 9403.10.00, HTSUS, which provides for other furniture of metal of a kind used in offices.

Law and Analysis:

Classification of imported merchandise is accomplished pursuant to the Harmonized Tariff Schedule of the United States (HTSUS). Classification under the HTSUS is guided by the General Rules of Interpretation of the Harmonized System (GRIs). GRI 1, HTSUS, states in part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes[.]"

The subheadings under consideration are as follows:

8302	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof:
8302.50.00	Hat-racks, hat pegs, brackets and similar fixtures, and parts thereof.
* * * * * * *	
8304.00.00	Desktop filing or card-index cabinets, paper trays, paper rests, pen trays, office-stamp stands and similar office or desk equipment and parts thereof, of base metal, other than office furniture of heading 9403.
* * * * * * *	
8305	Fittings for looseleaf binders or files, letter clips, letter corners, paper clips, indexing tags and similar office articles, and parts thereof, of base metal; staples in strips (for example, for offices, upholstery, packaging), of base metal:

8305.10.00	Fittings for looseleaf binders or files:
8305.90	Other, including parts:
8305.90.60	Other.

* * * * * * *

9403	Other furniture and parts thereof:
9403.10.00	Metal furniture of a kind used in offices.

When interpreting and implementing the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, while neither legally binding nor dispositive, provide a guiding commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. Customs believes the ENs should always be consulted. See, T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 83.04, p. 1215 states:

> The heading covers filing cabinets, card-index cabinets, sorting boxes and similar office equipment used for the storage, filing or sorting of correspondence, index cards or other papers, provided the equipment is not designed to stand on the floor or is not otherwise covered by Note 2 to Chapter 94 (heading 94.03) (see the General Explanatory Note to Chapter 94). The heading also includes paper trays for sorting documents, paper rests for typists, desk racks and shelving, and desk equipment (such as bookends, paperweights, inkstands and ink-pots, pen trays, office-stamp stands and blotters).

Recently, the U.S. Court of International Trade reiterated that "[i]t is well established that an imported article is to be classified according to its condition as imported * * *." *XTC Products, Inc. v. United States*, 15 CIT 348, 352, 771 F.Supp. 401, 405 (1991). See also, *United States v. Citroen*, 223 U.S. 407 (1911). In their imported condition, the individual parts of base metal which, when mounted and used in tandem, comprise the filing systems, do not constitute desk equipment. The parts, constructed of base metal, are entered separately, such that upon entry, what is received is a crate of brackets, wall hangers, or other parts of base metal. As such, the articles are not classifiable as desk equipment.

Section XV, Note 2, states, in pertinent part, that:

> 2. Throughout the tariff schedule, the expression "parts of general use" means:
>
> (a) Articles of heading 7307, 7312, 7315, 7317 or 7318 and similar articles of other base metals;
>
> (b) Springs and leaves for springs, of base metal, other than clock or watch springs (heading 9114); and
>
> (c) Articles of heading 8301, 8302, 8308 or 8310 and frames and mirrors, of base metal, of heading 8306.

Heading 8302 provides for base metal mountings, fittings and similar articles * * * base metal hat-racks, hat-pegs, brackets and similar fixtures[.] EN 83.02 provides, in pertinent part, that:

> [t]his heading covers general purpose classes of base metal accessory fittings and mountings, such as are largely used on furniture, doors, windows, coachwork, etc. * * * The heading **does not**, however, **extend** to goods forming an essential part of the structure of the article, such as window frames or swivel devices for revolving chairs [emphasis in original].

This heading covers:

* * * * * * *

> (G) **Hat-racks, hat-pegs, brackets** (fixed, hinged, or toothed, etc.) and **similar fixtures** such as coat racks, towel racks, dish-cloth racks, brush racks, key racks [emphasis in original].

The metal racks are *ejusdem generis* with the above exemplars (see *Sports Graphics, Inc. v. United States*, 24 F. 3d 1390, 1392 (Fed. Cir. 1994)), "[a]s applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms"). The essential characteristic or purpose of the above-listed exemplars is that they are racks used to hang and store things, such as coats, towels, dish cloths, brushes and keys. The metals racks at issue share this essential characteristic or purpose.

Accordingly, the metal racks are classifiable in heading 8302, HTSUS, as brackets and similar fixtures of base metal in subheading 8302.50.00, HTSUS. Pursuant to Section XV, Note 2(c), above, they are parts of general use. Because Note 1(d), Chapter 94, provides that Chapter 94 does not include parts of general use as defined in section XV, Note 2, the metal racks may not be classified in heading 9403, HTSUS. However, insofar as classification in heading 9403 is concerned, we also note that Chapter 94, Note 2, provides that to be classified within this heading, an article **must** be designed for placing on the floor or ground, unless the articles are "[c]upboards, bookcases or other shelved furniture and unit furniture" or "[s]eats and beds" which are "designed to be hung, to be fixed to the wall or to stand one on the other." The subject articles do not satisfy this criteria. The articles cannot be considered to be furniture; they are blueprint filing devices designed to be permanently fixed to a wall. The intended use is to organize blueprints and other large documents; not to furnish an office. Accordingly, classification in heading 9403, HTSUS, is precluded.

The metal clamps, item #'s 5001–6 and 4303–6, are *ejusdem generis* (see above) with the articles of heading 8305, HTSUS. Heading 8305 includes fittings for binders or files, letter clips, paper clips, **and similar articles** of base metal (emphasis added).

EN 8305, p. 1215, states, in pertinent part, that:

> [t]his heading covers base metal fittings of the clip, cord, spring lever, ring, screw, etc., types, for loose-leaf binders or box files. It further includes protecting rings, bands and corners for ledgers or other stationery books; also office stationery in metal of the type used in fastening together or index-marking papers (*e.g.*, letter clips, paper clips, paper fasteners, letter corners, card indexing tags, file tags, spike files); staples in strips of the kind used in stapling machines, in offices, for upholstery, for packaging, etc.
>
> The heading excludes:
>
> (a) Drawing pins (e.g., heading 73.17 or 74.15).
> (b) Clasps and fasteners for books, ledgers, etc. (heading 83.01 or 83.08).

The essential characteristics of the above examples is that they are of metal and by some method hold, clip or fasten papers. The metal clamps at issue share these essential characteristics or purposes, as they hold up to 100 blueprint sized papers. Therefore, the metal clamps are classifiable in heading 8305, HTSUS.

The comment received in response to the May 26, 1999, CUSTOMS BULLETIN notice proposing to revoke NY C88471 contends that the metal clamps are parts of furniture of heading 9403, HTSUS, or, alternatively, if classifiable in heading 8305, HTSUS, they are properly classifiable in subheading 8305.10.00, HTSUS, instead of subheading 8305.90.60, HTSUS, as proposed. The first part of this comment is addressed above (see discussion of "parts of general use" as defined in Note 2, Section XV, HTSUS, and exclusion, in Note 1(d), Chapter 94, HTSUS, from Chapter 94 of such parts of general use). However, the proposed alternative classification within heading 8305 has merit. That is, subheading 8305.90.60, HTSUS, is a so-called "basket" provision and, classification in such a provision "is appropriate only where there is no tariff category that covers the merchandise more specifically" (*Apex Universal, Inc. v. United States*, CIT Slip Op. 98–69 (May 21, 1998)). Subheading 8305.10.00, HTSUS, providing for fittings for looseleaf binders or files, does, under the principles of *ejusdem generis* (see above), cover the metal clamps more specifically than subheading 8305.90.60, HTSUS. They are classified in subheading 8305.10.00, HTSUS, as fittings for looseleaf binders or files of base metal.

Holding:

The metal racks for storage and filing of oversized paper documents are classifiable within subheading 8302.50.00, HTSUS, which provides for base metal hat-racks, hat pegs, brackets and similar fixtures, and parts thereof.

The metal clamps for oversized paper documents are classifiable within subheading 8305.10.00, HTSUS, as base metal fittings for loose leaf binders or files.

NY C88471, dated June 18, 1998, is **revoked**. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Anne Ridgway

Senior Judges

James L. Watson

Herbert N. Maletz

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Decisions of the United States Court of International Trade

(Slip Op. 99–48)

FORMER EMPLOYEES OF CHAMPION AVIATION PRODUCTS, PLAINTIFFS *v.* HERMAN, SECRETARY OF LABOR, DEFENDANT

Court No. 98–02–00299

[Remanded to the Secretary of Labor for additional consideration.]

(Decided June 4, 1999)

Dewey Ballantine, L.L.P. (John A. Ragosta, Bradford L. Ward, Michael R. Geroe, David A. Bentley), for Plaintiffs.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Katherine A. Barski), Scott Glabman,* Attorney, Office of the Solicitor, United States Department of Labor, of counsel, for Defendant.

MEMORANDUM AND ORDER

BARZILAY, *Judge:* Plaintiffs applied for trade adjustment assistance on October 22, 1997, by filing a petition with the Secretary of Labor ("Secretary") and the Commonwealth of Pennsylvania.[1] Following an investigation, the Secretary denied Plaintiffs' request. 63 Fed. Reg. 577, 578 (Jan. 6, 1998). By letter dated January 6, 1998, Plaintiffs requested reconsideration of the negative determination, which the Secretary also denied. 63 Fed. Reg. 6208–09 (Feb. 6, 1998). Plaintiffs instituted this case by letter dated February 9, 1998, to challenge the Secretary of Labor's denial of Trade Adjustment Assistance under section 221 of the Trade Act of 1974 (19 U.S.C. § 2271 (1994)) and under section 250 of the Trade Act of 1974, as amended by the NAFTA Transitional Adjustment

[1] Plaintiffs followed the dual track set forth in the trade adjustment assistance statutes, whereby they filed for an initial determination of eligibility for trade adjustment assistance under section 250 of the Trade Act of 1974, as amended by the North American Free Trade Agreement Transitional Adjustment Assistance Act ("NAFTA-TAA"), with the state in which the employees are located and for trade adjustment assistance under the Trade Act of 1974 ("TAA") with the Secretary. Pennsylvania forwarded its negative recommendation and its preliminary findings to the Department of Labor ("Labor") for review. A Labor investigator conducted a survey of Champion's customers for purposes of the TAA petition, AR 10–15, and prepared reports for both the TAA petition and the NAFTA-TAA petition. AR 20–22, 56–57. The Secretary denied both the NAFTA-TAA request and the TAA request. The statute vests responsibility for the determinations in the Secretary, so for purposes of the opinion the terms Secretary and Labor are used interchangeably.

Assistance Act (19 U.S.C. § 2331 (1994)). Only the NATTA-TAA request is before the Court. *See Pls Memo.*, n. 3. Plaintiffs' letter was deemed to satisfy the requirements under 28 U.S.C. § 1581(d) (1994) for a summons and complaint. The Court has jurisdiction under 28 U.S.C. § 1581(d)(1) (1994) and 19 U.S.C. § 2395(a) (1994).

I. BACKGROUND

Plaintiffs are former employees of Champion Aviation Products, a division of Cooper Industries ("Cooper"), who worked at a facility located in Pennsylvania ("Pennsylvania facility") which produced certain finished products and components for the aviation industry.[2] In this action Plaintiffs allege that they are entitled to trade adjustment assistance because they lost their jobs in a two-step shift, that is, their plant was closed because a plant owned by Cooper in Tennessee absorbed their production while a portion of the Tennessee production shifted to a Cooper facility in Mexico. [ ].[3] AR at 36. The finished products manufactured at Cooper's Pennsylvania facility in 1998 were [ ]. AR at 43. The finished products manufactured at Cooper's Tennessee facility in 1998 were automotive lamps and the record does not reveal what if anything else was produced there at the time.

Although the record does not indicate this affirmatively, Defendant maintains that at the end of January 1998 the Pennsylvania facility was operating at minimal capacity and was closed. *Def's Memo* at 4. [ ].[4] AR 36 [ ].[5] [ ]. AR at 5, 36. Forty-seven workers, Plaintiffs in this case, were separated because of the closing of the Pennsylvania facility. AR 36.

II. DISCUSSION

A. *Standard of Review*

An adjustment assistance case must be decided on the basis of the administrative record before the court. *See* 28 U.S.C. § 2640(c); *International Union v. Reich*, 20 F. Supp 2d 1288, 1292 (CIT 1998). A determination by Labor will be upheld if it is supported by substantial evidence and is otherwise in accordance with law. *Woodrum v. Donovan*, 5 CIT 191, 192, 564 F. Supp. 826, 828 (CIT 1983), *aff'd* 737 F.2d 1575 (Fed. Cir. 1984). Substantial evidence must be more than a "mere scintilla," it must be "enough reasonably to support a conclusion." *Ceramerica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (CIT 1986). The court may remand findings of fact made by the Secretary "for good cause shown" if the record is not complete and supported by substantial evidence. 19 U.S.C. § 2395(b) (1994).

With respect to the conduct of the investigation, "while Labor has a duty to investigate, 'the nature and extent of the investigation are mat-

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[2] The plant is located in Weatherly, Pennsylvania.

[3] [ ]. AR at 42. The Sparta facility reportedly is no longer owned by Cooper Industries and is now part of the lighting products division of Federal Mogul Corporation.

[4] [ ].

[5] [ ].

ters resting properly within the sound discretion of the administrative officials.'" *Former Employees of CSX Oil and Gas Corp. v. United States*, 720 F. Supp. 1002, 1008 (CIT 1989) (quoting Cherlin v. Donovan, 585 F. Supp. 644, 647 (CIT 1984)). However, "rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978). One indication of the unreasonableness of the agency's action is that the agency has entirely failed to consider an important aspect of the problem. *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

Plaintiffs request the Court to declare the Secretary's interpretation of the statute unreasonable and to enjoin the Secretary to certify Plaintiffs as eligible for trade adjustment assistance. In the alternative, Plaintiffs request a remand to the Secretary to supplement the investigative record in several areas. First, Plaintiffs argue that the Secretary's interpretation of the NAFTA-TAA provision is unreasonable because it relies exclusively on procedures used to implement the TAA. This approach, Plaintiffs maintain, fails to account for congressional intent to expand trade adjustment assistance in the North American Free Trade Agreement Implementation Act by providing for an additional reason for granting assistance—a shift in production to Canada or Mexico. 19 U.S.C. § 2331(a)(1)(B). Plaintiffs posit that the Secretary's analytical approach is flawed, and thus unreasonable, because it relies on product lines, without examining factors of production, land, labor and capital, to reach a decision on whether certain facilities should be considered part of the same subdivision and on whether like or directly competitive articles shifted. Without such an analysis, Plaintiffs claim that a shift in production is not observable. Plaintiffs argue that an analysis that does not account for situations where a shift in production occurs in more than one step is unreasonable.

In the alternative, Plaintiffs argue that the negative determination was not supported by substantial evidence because the investigation did not develop an adequate record to support the decision to deny adjustment assistance. In support of this argument, Plaintiffs point to the interview with the plant manager at the Pennsylvania facility as constituting the only evidence on whether a shift in production had occurred. [ ], but the record does not state the type or amount of equipment that moved. Additionally, Plaintiffs argue that the record lacks any evidence indicating why the Pennsylvania and Tennessee facilities do not constitute the appropriate subdivision. Finally, Plaintiffs maintain that the Secretary's denial of their request for reconsideration did not provide a reasoned explanation because it relied solely on the fact that workers at the Tennessee facility had not filed a petition for adjustment assistance.

This is a case of first impression. While the court has decided cases involving petitions for NAFTA-TAA, none of those decisions rested on the

statutory provision at issue. *See International Union v. Reich,* 22 CIT ____, 20 F. Supp. 2d 1288 (1998); *Former Employees of Digital Equipment Corp. v. United States,* 20 CIT ____, 937 F. Supp. 917 (1996); *Former Employees of Roeder Hydraulics, Inc. v. United States,* 19 CIT 825 (1995). The NAFTA-TAA provision before the Court governs shifts in production and requires the Secretary to certify workers as eligible for assistance if "there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly competitive with articles which are produced by the firm or subdivision." 19 U.S.C. § 2331(a)(1)(B) (1994).

Obviously, a critical factor in the analysis is the Secretary's determination of what constitutes the appropriate subdivision. 19 U.S.C. § 2331(a)(1)(1994). Under the case law governing TAA cases involving increased imports it is a "well-settled principle that determinations of what constitutes an appropriate firm or subdivision must be made along product lines." *See Abbott v. Donovan,* 6 CIT 92, 99, 570 F. Supp. 41, 48 (1983). Here, the Secretary relied on such a product line analysis, alone, in reaching her conclusions. But it is clear from the legislative history that Congress intended to expand the scope of worker coverage under the NAFTA-TAA provisions. Senator Roth explained in introducing the bill:

> The legislation I am introducing builds on TAA and will ensure that workers who lose their jobs because of freer trade with Mexico will be eligible for the full range of TAA benefits. It does this by expanding the coverage of such workers to include workers who are hurt because of United States production shifts to Mexico.

139 Cong. Rec. S5655, 5656 (daily ed. May 6, 1993) (statement of Sen. Roth). Additionally, it is evident that the law is and was intended to be remedial in nature, not only in the sense of providing assistance to displaced workers but to correct perceived deficiencies in prior TAA cases. *See* Senate Proceedings and Debates of the 103rd Congress, First Session, 139 Cong. Rec. S16092–01, S16107 (Nov. 18, 1993) ("[T]he new program is designed to remedy what has been identified as one of the shortcomings of the current TAA program."). That trade adjustment assistance is remedial was also noted by the Court of Appeals for the Sixth Circuit in *Morristown Magnavox Former Employees v. Marshall,* 671 F.2d 194, 197 (6th Cir. 1982). Moreover, use of the term "appropriate" suggests a degree of flexibility, particularly in light of the remedial nature of the statute. When interpreting remedial legislation, the court is to construe it broadly to effectuate its purpose. *See Gardner v. Brown,* 5 F.3d 1456, 1463 (Fed. Cir. 1993) (citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967)). In the context of TAA cases, the court has stated that the Secretary must "'choose a subdivision that best effectuates the purpose of the Trade Act in light of the circumstances of the individual case.'" *International Union v. Reich,* 20 F. Supp.2d 1288, 1293 (CIT 1998) (quoting Int'l Union v. Marshall, 584 F.2d 390, 397 (D.C. Cir. 1978)). Reliance by the Secretary on product lines alone to determine

what constitutes the appropriate subdivision in a case involving a shift in production, particularly when the shift may have occurred in more than one step, does not effectuate the expressed desire of Congress. Although it may be helpful for the Secretary to examine shifts in land, labor and capital to arrive at a determination of what constitutes the appropriate subdivision, the agency is in a better position than the Court to develop a methodology.[6] However, in determining the appropriate subdivision the Secretary must take into consideration that there may have been a two-step shift in production.

Because the record is incomplete, the Court does not find it appropriate, at this point, to declare the Secretary's negative determination unreasonable, and thus, to enjoin her to certify Plaintiffs as eligible for assistance. Several inadequacies exist in the record that, aside from the Secretary's interpretation of appropriate subdivision, require remand. At this stage, because the record lacks adequate factual development and because the legal basis of the Secretary's decision denying reconsideration is not clear, remand will afford the Secretary the opportunity to reconsider her determinations following ftirther fact finding. Once the record is more developed, should the need arise, the Court will be in a better position to evaluate the reasonableness of the Secretary's actions.

The court grants the Department considerable discretion in the conduct of its investigations. *See Former Employees of Komatsu Dresser v. United States Secretary of Labor,* 16 CIT 300, 303 (1992). But, "where [the Department] conducts an inadequate investigation by failing to make a reasonable inquiry, the court has good cause to remand the case * * * to take further evidence." *Id.* and cases cited therein. The Court finds that the Department's investigation concerning whether there was a shift in production to Mexico was not adequate and thus, good cause exists to remand this case to the Secretary. The record below is deficient in a number of ways.

In *Former Employees of Linden Apparel Corp. v. United States,* 13 CIT 467, 715 F. Supp. 378 (1989), the court explained "[i]f the company under investigation is part of a larger corporate entity, the Secretary has a *duty* of providing a description of the organizational structure and of inquiring into how the subject company fits into the organization." *Id.* at 470, 715 F. Supp. 381 (emphasis added). Here, the Department failed to describe the relationship between the Pennsylvania facility and the other facilities within Cooper Industries. As the court stated in *International Union,* "'[t]he mechanical adoption of the plant as the appropriate subdivision without reasoned analysis is improper.'" *Id.* at 1293 (quoting Lloyd v. United States Dep't of Labor, 637 F.2d 1267, 1275 (9th Cir. 1980). Moreover, "DOL must analyze the underlying facts and explain

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[6] On this point, the Court notes that the proposed regulation defining a shift in production provides little guidance. *See Trade Adjustment Assistance for Workers; Amendment of Regulations,* 60 Fed. Reg. 3472, 3480 (Jan. 17, 1995). The language of the proposed regulation vanes only slightly from the language of the statute and gives no indication of a methodology. It seems inadequate given the clear intent of the new statutory provision to protect workers who lose their jobs because of production shifts.

why, reasonably based upon those facts, it would not include another facility within what the agency determines to be the 'appropriate subdivision.'" *Id.* at 1293–94. Further development of the record is needed on Cooper's organizational structure, and the Pennsylvania facility's place within it. There is nothing in the record to support the Secretary's determinations on what constitutes the appropriate product line.[7] Without such knowledge it is not possible to determine whether substantial evidence exists to support the Secretary's designation of the Pennsylvania facility as the appropriate subdivision.

In addition to the lack of record evidence to support the determination that the Pennsylvania facility alone should be considered as the appropriate subdivision, an interview with the Pennsylvania facility's plant manager constitutes the only source of record evidence supporting the Secretary's negative determination on the shift in production issue. This interview is not sufficient evidence on which to base a determination about whether a shift in production has occurred. *See e.g., Former Employees of Komatsu Dresser v. United States Secretary of Labor,* 16 CIT 300, 304 (1992) (finding customer surveys useless under the circumstances). Further, the Department failed to ascertain the amounts and types of equipment Champion moved from the Pennsylvania facility to Mexico. Such inforination is relevant in evaluating whether a shift in production may have occurred directly from Pennsylvania to Mexico. At the least, the absence of any evidence on the record beyond noting a shift of some equipment demonstrates the inadequacy of the investigation and suggests the need for further development of the record.

Finally, the Court finds that the Department did not provide Plaintiffs with a reasoned explanation for denying their claims for NAFTA-TAA. Plaintiffs asserted in their letter requesting reconsideration of the negative determination that their separation occurred because space and employees at the Mexican facility enabled a two-step shift in production. The Department's sole stated reason for denying consideration of the NAFTA-TAA claim was that workers at the Tennessee facility had not filed for adjustment assistance. AR at 32. The Department's statement in the notice of denial is not a reasoned explanation to which the Plaintiffs are entitled. *See International Union v. Reich,* 20 F. Supp.2d 1288, 1293 (CIT 1098) (citing Int'l Union v. Marshall, 584 F.2d 390, 396 (D.C.Cir. 1978)).

III. Conclusion

For the reasons discussed herein, the Court finds that the Secretary conducted an inadequate investigation as to whether Plaintiffs are entitled to NAFTA-TAA because of an alleged shift in production to Mexico. The Secretary's determination of the appropriate subdivision of Plaintiffs' firm is not supported by substantial evidence. Additionally, the Secretary's determination that a shift in production had not occurred is not supported by substantial evidence. Accordingly, it is hereby

[7] Plaintiffs allege that the record shows Cooper produced [ ]. AR 42, [ ].

ORDERED that this case is remanded to the Secretary to make additional finding's consistent with the reasoning in this opinion, including but not limited to: determining what the appropriate subdivision is in light of the purposes of NAFTA-TAA and accounting for the possibility that a two-step shift in production may have occurred; providing a more detailed explanation of whether the articles produced at the Pennsylvania facility are like or directly competitive with the articles produced in Mexico; describing the types and amounts of equipment that moved to Mexico from Pennsylvania; and it is further

ORDERED that the Secretary shall reevaluate whether Plaintiffs are eligible for NAFTA-TAA under 19 U.S.C. § 2331(a)(1)(B) in the light of any new evidence and of the directives of the Court and issue a final determination within 45 days after the date of this opinion, providing the Court a copy of that determination within five days of its issuance; and it is further

ORDERED that any comments or responses by the parties to the remand results are due on or before 20 days from the date of the Secretary's final determination and are limited to 20 pages, any rebuttal comments are due 20 days thereafter and are limited to 10 pages.

NOTE: This is to advise that Slip Op. 99–49 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 99–49)

SANYO ELECTRIC CO., LTD. AND
SANYO ELECTRIC INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 87–04–00620

(Dated June 4, 1999)

(Slip Op. 99–50)

BORDEN, INC., GOOCH FOODS, INC. AND HERSHEY FOODS CORP., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS AND DELVERDE, SRL AND DELVERDE USA, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 96–08–01970

[Amended Final determination following remand sustained as to plaintiffs Borden, Inc., Gooch Foods, Inc., and Hershey Foods Corp. and defendant-intervenors Delverde, SrL and Delverde USA.]

(Dated June 4, 1999)

Collier, Shannon, Rill & Scott, PLLC (Paul C. Rosenthal, Kathleen W. Cannon, David C. Smith, Jr., and *John B. Brew)* for plaintiffs Borden, Inc., Gooch Foods, Inc., and Hershey Foods Corp.

Neville, Peterson & Williams (Lawrence J. Bogard), Mound, Cotton & Wollan (Constantino P. Suriano) for defendant-intervenors Delverde, SrL and Delverde USA.

David W. Ogden, Acting Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Erin E. Powell), Dean Pinkert*, Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendants.

OPINION

RESTANI, *Judge:* This matter is before the court following remand to the United States Department of Commerce ("Commerce") of *Certain Pasta from Italy*, 61 Fed. Reg. 30,326, 38,547–01, 42,231–02 (Dep't Commerce 1996) (final and amended final determinations of sales at less than fair value). Familiarity with the court's earlier decision in this case is presumed. *See Borden, Inc. v. United States*, 4 F. Supp.2d 1221 (Ct. Int'l Trade 1998) [hereinafter *"Borden I"].* Issues relating to respondent DeCecco were resolved in *Borden, Inc. v. United States*, No. 98–167, 1998 WL 895890 (Ct. Int'l Trade Dec. 16, 1998) (remand determination affirmed as to De Cecco). As to the issues remaining, following remand, the court sustains Commerce's *Redetermination on Remand* [hereinafter *"Remand Determination"].*

I. Targeted Dumping

BACKGROUND

Borden asked the court to find that Commerce erred in failing to calculate dumping margins for Delverde by comparing weighted-average normal values to transaction-specific export prices, pursuant to 19 U.S.C. § 1677f–1(d)(1)(B) (1994), the "targeted dumping" provision of the anti-dumping statute. The court remanded to Commerce to continue its targeted dumping inquiry. *Borden I*, at 1248. On remand, the court required that Commerce either articulate standards by which it would evaluate a targeted dumping petition or, if not yet prepared to do so, that Commerce conduct its own analysis of the data to determine whether to calculate dumping margins for Delverde using transaction-specific rather than weighted-average prices. *Id.* at 1229. The court fur-

ther instructed that if Commerce chose to articulate the standards by which a targeting petition would be evaluated, the agency was also obliged to clarify the allocation of the analytical burden between petitioners and Commerce. *Id.* at 1230.

Commerce chose to articulate the standards by which it would evaluate a targeted dumping petition, explicitly noting that the methodology developed for this case might vary in the future. *Remand Determination*, at 15. After receiving comments on its proposed standards, Commerce released its final methodology by letter on July 22, 1998. *Id.* at 17.

Commerce defined price difference as a separation in price, defining price as gross unit prices less adjustments for movement charges, discounts, rebates, and post-sale price adjustments. *Id.* at 16. Accordingly, if targeting had occurred, the allegedly targeted purchaser would receive a lower average price than each allegedly non-targeted purchaser, and that price difference would not be attributable to non-targeting factors such as product type, level of trade, time of sale, or terms/conditions of sale. *Id.*

Commerce defined two ways it would identify price differences significant enough to trigger a targeted dumping investigation. First, to avoid the illogical conclusion that the majority of purchasers were targeted,[1] the price to the allegedly targeted purchaser must be in the lowest 20 percent of all average transaction prices. *Id.* Second, to determine what magnitude of price differences is significant for the market at hand, Commerce requires that the price separation between allegedly targeted and non-targeted customers must be equal to or greater than the maximum price separation within the non-targeted group, unless a party shows the exporter's data to be non-representative of the industry as a whole. *Id.*

Commerce also defined which significant price differences would qualify as a pattern. Specifically, the department would recognize a pattern of significant price differences if i) they existed, on average, over all relevant time periods and for all products sold by the exporter to the allegedly targeted customer or customers, and ii) average transaction prices exhibited a "downward skewness" with respect to allegedly targeted customers. *Id.* Commerce noted, in response to comments from the parties, that the department would relax its standards if a party could show that the allegedly targeted purchasers comprised a well-defined group, such as those who buy for a niche market or those who recently changed suppliers due to price-undercutting. *Id.* at 16–17.

Following Commerce's detailed instructions for identifying customers frequently "at the bottom," *Letter from Commerce* (July 22, 1998), Attachment, at 1, Borden filed a targeted dumping petition against Delverde on July 27, 1998. *Remand Determination*, at 17. On the basis of this application, Commerce decided to pursue a targeted dumping inves-

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[1] By definition, if a petition alleges that the price charged the *majority* of purchasers is less than fair value, that petition effectively does not allege targeting. Likewise, if the majority of purchasers are sold goods at less than fair value, the risk that weighted-average price comparisons will mask dumping evaporates.

tigation of Delverde. *Id.* In its July 27, 1998 petition, Borden had alleged that all customers "frequently at the bottom" were being targeted by Delverde. *Draft Remand Determination on Targeted Dumping* (Aug. 20, 1998), at 2 [hereinafter *"Draft Redetermination"*].

Commenting that this might have been the result of a misunderstanding by Borden, Commerce modified its targeting inquiry for this single occasion. *Id.* at 2–3. Commerce considered that the set of purchasers proposed by Borden might be over-inclusive and might mask actual targeting. *Id.* at 3. Commerce announced that in addition to its targeting analysis of Borden's data, it therefore also would perform this analysis on a subset of Borden's purchaser group: those found at the lower end of that set. *Id.* at 3.

On the basis of these calculations, Commerce concluded that the data did not reveal targeted dumping by respondent Delverde. *Remand Determination*, at 17. Borden here challenges five aspects of Commerce's *Remand Determination*.

Discussion

a. Motion to Amend and Exhaustion of Administrative Remedies

Borden makes three arguments which pertain to the targeted dumping petition it filed under Commerce's methodology announced during remand. The court addresses two of these at this point and the third in a separate section below. First, Borden alleges that Commerce erred in its targeted dumping analysis when it deviated from its normal calculation methodology for determining net prices by including selling expenses incurred by Delverde. Second, Borden argues that Commerce incorrectly included customer category as a control factor in its targeted dumping analysis, despite a prior finding that all sales were made at the same level of trade. *Plaintiffs' Comments on Redetermination on Remand* (Sept. 28, 1998), at 9–10 [hereinafter *"Plaintiffs' Comments"*].

In their response to Borden's comments on the *Remand Determination*, defendants noted that Borden's argument regarding the inclusion of selling expenses was not raised before the agency. *Defendants' Response* (Oct. 2, 1998), at 1. Defendants now seek leave to amend their response to raise the same concern with respect to Borden's customer category claim, proposing to argue that Borden failed to exhaust its administrative remedies in failing to raise this question during the administrative stages of the remand.[2] *Defendants' Amended Response* (Oct. 9, 1998), at 1.

Borden responds with an equitable argument that Commerce should not be permitted to amend its response. *Plaintiffs' Opposition to Defendants' Amended Response* (Oct. 26, 1998), at 2–3. Borden complains that after the agency had received an extension of time amounting to three additional months to submit its remand analysis to the Court, the

[2] In its response to Borden's and defendants' comments after the Remand Determination, Delverde raised the issue of Borden's failure to exhaust its administrative remedies as to both the selling expense and customer category issues. Thus, the court would be required to address the exhaustion issue, whether Commerce raised it or not. One might argue, however, that Commerce has a more direct interest in the procedural issue.

agency permitted Borden only a few days to respond to each of three statistically-complex stages during the remand. In particular, the agency required Borden to comment upon its draft redetermination dated Thursday, August 20, 1998, by close of business Monday, August 24, 1998. *Id.* at 2. Given this tight schedule, Borden finds unfair Commerce's attempt here to preclude arguments Borden failed to raise in that short period. Accordingly, Borden specifically requests that the court deny Commerce leave to amend its response to *Plaintiffs' Comments* to make this preclusion argument in light of the relatively long time Commerce had (11 days) to respond in the first place.

Borden's response to Commerce's motion compounds the exhaustion issue. Borden did not make a due process objection—or any other kind—to Commerce's response schedule in either its response to Commerce's *Draft Redetermination* or in *Plaintiffs' Comments*. Nor, strictly speaking, does Borden make such an argument here, relying only on its persuasive value in equity.[3] The court notes that Commerce has not promulgated regulations specifying certain procedures or timing on remand.

The court is satisfied from the record that as a factual matter, Borden failed to raise either the selling expense or the customer category issue during the administrative phase of the remand. To the extent they are divisible, the court addresses the motion to amend and the exhaustion issue in turn.

The court considers Commerce's October 9, 1998 motion to amend its response to *Plaintiffs' Comments* analogous to a motion to amend a pleading. A party may amend its pleading by leave of court. USCIT Rule 15(a). The court has the discretion to grant or deny a motion to amend. *See Saarstahl AG v. United States*, 949 F. Supp. 863, 866 (Ct. Int'l Trade 1996), *aff'd in part, rev'd in part*, 1999 WL 203323 (Fed. Cir. Apr. 12, 1999). The Rule provides, in relevant part, that "a party may amend the party's pleading * * * by leave of court," and that "leave shall be freely given when justice so requires." USCIT Rule 15(a).

The Supreme Court has described the parameters of this discretion.[4] *Foman v. Davis*, 371 U.S. 178, 182 (1962). In *Saarstahl*, 949 F. Supp. at 866, this court denied a motion to amend the complaint because of un-

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[3] Even if the court should consider that Borden unwittingly has raised a due process issue at this belated stage, and even if the court deemed such a due process claim to be viable in an antidumping context, the claim likely would be unavailing to Borden. The court applies a rule of reason in evaluating administrative due process claims. *See United States v. Islip*, 18 F. Supp.2d 1047, 1064–66 (Ct. Int'l Trade 1998) (Customs fraud defendant given seven rather than the required 30 days to respond was not deprived of due process such as would preclude jurisdiction on review because "[d]efendant was ultimately given sufficient opportunity to be heard at the administrative level.") Borden's thoughtful responses to Commerce's proposed methodology and draft redetermination, and Commerce's responses to those detailed remarks in the *Remand Determination* clearly show that, as a practical matter, Borden was not substantially deprived of an opportunity to be heard before the agency.

[4] In *Foman*, the Supreme Court discussed Fed. R. Civ. Proc. 15(a), which contains the same language and is parallel to USCIT Rule 15(a). *See also Earth Island Institute v. Christopher*, No. 95–169, 1995 WL 604708, at *1 (Ct. Int'l Trade Oct. 12, 1995). The Court in *Foman* stated,

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be $freely given.'

Foman, 371 U.S. at 182.

due delay and unfair prejudice to the other parties. By contrast, defendants' motion to amend here cannot be said to be unduly delayed, as it followed almost directly the procedural event (the filing of defendants' response to Borden) it seeks to revise. None of the other factors listed in *Foman* suggest that the court must deny defendants' motion. That the argument therein may be damaging to Borden does not render the amendment unduly prejudicial. The court therefore grants defendants' motion and allows the proposed amendment.

The court now turns to the question of exhaustion of administrative remedies as to both the selling expense and the customer category issues. In the Court of International Trade, the doctrine of the exhaustion of administrative remedies is statutorily based. 28 U.S.C. § 2637 (1994). With certain enumerated exceptions, the court is instructed that it "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d).

The exhaustion requirement of § 2637(d) is discretionary rather than strictly jurisdictional. *United States v. Priority Products, Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986). The court may decide to waive the requirement and reach an issue not raised before the agency. *Id.* (emphasizing the discretionary language in 28 U.S.C. § 2637(d)).

When the court bases its review of an administrative decision on grounds not before the agency, it "deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452, 773 F. Supp. 1549, 1554 (1991) (citing *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)). Accordingly, the court will not hear an issue a party failed to raise during the administrative process where that issue does not fall within one of the recognized exceptions to the exhaustion doctrine. *See Federal-Mogul Corp. v. United States*, 18 CIT 785, 803–04, 862 F. Supp. 384, 402 (1994) (issue excluded for failure to exhaust where no exception to exhaustion requirement permits the court to entertain the argument).

One aim of the exhaustion doctrine is to give the agency a chance to address the issue before the court considers it.[5] *McKart v. United States*, 395 U.S. 185, 194 (1969); *see also Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp.2d 807, 821 n.6 (Ct. Int'l Trade 1998) (permitting party to raise issue despite failure to exhaust where agency had "ample opportunity to respond to th[e] question at the administrative level").

The majority of the cases collected in *Budd*, 15 CIT at 452 n.2, illustrating exceptions to the exhaustion doctrine, represent instances where this purpose would not be effected by strict application of the doctrine. *See, e.g., Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 136, 583 F. Supp. 607, 611 (1984) (recognizing that plaintiff raised new, purely le-

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[5] Other purposes include giving effect to the agency's governing statute, permitting the agency to make a record, respect for agency expertise and discretion, administrative efficiency in discouraging parties from seeking interlocutory review, and respect for administrative autonomy. *McKart*, 395 U.S. at 193–95.

gal argument requiring no further agency involvement); *Timkin Co. v. United States*, 10 CIT 86, 92–93, 630 F. Supp. 1327, 1334 (1986) (reasoning that an intervening judicial interpretation following remand changed the result); *Rhone Poulenc*, 7 CIT at 135, 583 F. Supp. at 610–11 (considering that an administrative challenge asking the agency not to apply its regulation would have been futile); *Philipp Bros., Inc. v. United States*, 10 CIT 76, 80, 630 F. Supp. 1317, 1321 (1986) (finding plaintiff lacked timely access to administrative record).

Though the court has recognized exceptions to the doctrine, there are established limits, especially as to the issue now before the court. In *Bethlehem Steel Corp. v. United States*, 1988 WL 731602, *5 (Ct. Int'l Trade Oct. 14, 1998), where Commerce was required by statute, under 19 U.S.C. § 1677m(g), to permit the parties a "reasonable time" to respond to a submission, and the agency allowed a party only two days to respond, the court concluded that, "[b]y failing to protest at the time of its response, [the party] failed to exhaust its administrative remedies within the meaning of 28 U.S.C. § 2637(d) (1994). Thus it cannot now claim that it had an inadequate opportunity to comment on the supplemental information." *Bethlehem Steel*, 1988 WL 731602, *5. Where a party *did* express difficulty with the time permitted by the agency for response, the court has been more flexible in allowing non-exhausted claims. *See Al Tech Specialty Steel Corp. v. United States*, 11 CIT 372, 378, 661 F. Supp. 1206, 1211 (1987) (allowing claims where request to agency for additional time went unanswered). Thus, it can be seen that failure to protest time limits before the agency is crucial to the survival of related claims.

As noted, Borden did not request additional time from the agency or raise a protest about the time Commerce allowed for comments from the parties either to the agency itself or in its initial response to the *Remand Determination* submitted to the court. The court concludes that Borden has foregone its opportunity to protest the time allowed it. To the extent Borden makes it, the court disallows that claim for failure to have exhausted administrative remedies.

Likewise, the court rejects Borden's defense, by way of reference to the short time period, of its failure to have exhausted its administrative remedies as to its selling expense and customer category claims. Borden does not, and on this record could not, argue that the selling expense or customer category issue was considered by the agency. The court therefore declines to hear those claims and proceeds to consider Borden's remaining arguments.

b. Price Mean Comparisons

In its effort to establish whether the data showed a *pattern* of significant price differences, Commerce conducted a "skewness test," stating that "average transaction prices must exhibit a downward skewness with respect to allegedly targeted customers." *Remand Determination*, at 16. Where the difference between the highest price among non-targeted customers and the median price for all customers exceeded the dif-

ference between the highest price among the set of customers defined as "frequently at the bottom" and the median price, Commerce concluded that no targeting had occurred. *Plaintiffs' Comments*, at 7–8.

Borden objects that this methodology is "inappropriate" because it

> relies heavily on the differences in distances between the comparison points (highest price to non-targeted and targeted customers) to the median, and therefore distorts the Department's analysis of Delverde's pricing practice for purposes of [the] skewness test. The results of such a "skewness test" will, in turn, defeat any attempt to prove the existence of targeted dumping.

Plaintiffs' Comments, at 8–9.

The court finds no actual argument within this conclusory statement. Borden provides no basis upon which the court could evaluate its claim. Borden simply argues that the test is "inappropriate" because it does what it purports to do, because it makes comparisons it purports to make. Borden has not argued that the skewness test, as developed and implemented by Commerce, would not in fact measure downward skewness. Nor has Borden argued that a test for downward skewness would or could not establish the "pattern" required by the statute. Most significantly, Borden has made no attempt to show *how* Commerce's methodology would preclude a finding of targeted dumping altogether.

c. Other Methodological Arguments

Borden's also makes two arguments based on hypotheticals in response to Commerce's *Remand Determination*. Borden argues that Commerce's methodology i) would preclude a targeted dumping allegation against a single large customer and ii) would fail to account for customers who purchase only in certain months within the period of inquiry. Although Borden refers to its data set in making these arguments, Borden itself casts these arguments as hypothetical.[6] *Plaintiffs' Comments*, at 3–7. Borden has alleged neither that Delverde has targeted a single large customer nor that targeting has been overlooked in the group of allegedly targeted customers due to high sales concentration within a few months. Moreover, Borden concedes that petitioners *might have* alleged targeting against a single customer, *Plaintiffs' Comments*, at 5, which the court reads as a concession that it has not done so.

Because the court may not engage in abstract review, it requires an actual case or controversy to hear any issue, U.S. Const. art. III, § 2. Here, the court would likely require an allegation of targeting against a single, large customer or against customers who purchase only in certain months in order to determine whether the methodology is legal in such situations. Even if no constitutional standing problem exists, the court declines to reject a methodology based solely on hypothetical applications beyond the administrative record. Commerce might welcome Borden's arguments as suggestions for improvement or refinement of

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[6] The abstract nature of these arguments is highlighted by Borden's use of conditionals and the subjunctive. *See Plaintiffs' Comments*, at 5–6.

its targeted dumping methodology as applied in future cases,[7] but these do not provide a basis upon which the court could order a remand or any other relief on this record.

II. Level of Trade

Before remand, Delverde argued that Commerce, during Delverde's level of trade inquiry, unlawfully denied its request for a constructed export price ("CEP") offset, an adjustment to normal value which Delverde claimed would have led to a *de minimis* dumping margin. The court remanded to Commerce to revise its level of trade analysis without recalculating constructed export price. *Borden I*, at 1242.

No party contends that Commerce did not comply with the court's directions with regard to the level of trade adjustments. Commerce does complain that it could not recalculate CEP under the court's direction. That is true. The court found that it was improper to order a remand on that aspect of the original determination which was not challenged by the parties, where remand was *opposed* by both the domestic and foreign interests and Commerce asked for a remand at the last minute and did not explain its "error." *Id.*

The CEP calculation itself was final, and the court did not permit its reworking. It is not appropriate for Commerce to seek reconsideration by means of new arguments in a remand determination; respondent must live with the results of its choices as well. There are rules which govern both the issuance of final determinations and the litigation of cases, and the court and parties must abide by them. Finality is an important aspect of the unfair trade laws. It is served by both exhaustion rules and limitations on remand.

Accordingly, the court affirms all aspects of the *Remand Determination* addressed herein.

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[7] Commerce has not only "reserved the discretion to alter [its] methodology in future cases," *Remand Determination*, at 15, but, in response to comments by the parties at earlier stages of this inquiry, has also expressed a good faith willingness to do so as appropriate in future cases, *see id.* at 17–20.

(Slip. Op. 99–51)

MICRON TECHNOLOGY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND LG SEMICON CO., LTD., AND LG SEMICON AMERICA, INC., DEFENDANT-INTERVENORS

Court No. 96–06–01529

[Remand Results of the U.S. Department of Commerce remanded.]

(Dated June 16, 1999)

Hale & Dorr, LLP (Gilbert B. Kaplan, Michael D. Esch, Paul W. Jameson, and *Cris R. Revaz),* for plaintiff Micron Technology, Inc.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis);* office of the Chief Counsel for Import Administration, United States Department of Commerce *(Patrick V. Gallagher, Jr.),* of counsel, for defendant.

Kaye, Scholer, Vierman, Hays & Handler, LLP (Michael P. House and *Raymond Paretzk),* for defendant-intervenors LG Semicon Co., and LG Semicon America, Inc.

MEMORANDUM OPINION AND ORDER

GOLDBERG, *Judge:* The Court reviews the Department of Commerce's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* (Mar. 31, 1999) ("Remand Results"),[1] filed with the court in accordance with its opinion and order in *Micron Technology, Inc. v. United States,* No. 99–12 (CIT Jan. 28, 1999).[2] The Court found in *Micron* that it was unclear whether Commerce used the same methodology to calculate total R&D expenses for LG Semicon Co., and LG Semicon America, Inc. (collectively, "LG Semicon"), as it used to calculate purchased R&D expenses. Therefore, the Court remanded in part, with instructions that Commerce articulate "the precise methodology it * * * used to calculate total R&D expenses." *Micron,* No. 99–12, slip op. at 10–11 (CIT Jan. 28, 1999). Importantly, when crafting its remand instruction, the Court cautioned that "Commerce should ensure that its clarified methodology is non-distortive and that it accurately and reasonably reflects costs. In particular, the Court notes that if Commerce continues to base its total R&D figure on those costs expensed in 1993, it should refrain from including in this figure those R&D costs expensed in 1993, yet incurred prior to 1993. Basing the total R&D figure on costs actually incurred and expensed in 1993 *plus* costs expensed in 1993, yet incurred prior to 1993 conflates the amortizing and expensing methodologies and is plainly distortive. It effectively results in double counting and, as such, should be rejected." *Id.,* slip op. at 11 (CIT Jan. 28, 1999).

On remand, Commerce clarified its methodology for calculating R&D expenses and recalculated LG Semicon's dumping margin in accordance with this methodology. As a result, LG Semicon's margin remained at

[1] See Remand Redeterminations (visited June 8, 1999) <http://www.ita.doc.gov/import_admin/records/remand.html>.

[2] Familiarity with the Court's earlier opinion is presumed.

0.00% for the first review period. Substantively, however, Commerce ignored the Court's remand instruction. In its revised total R&D figure, Commerce included R&D costs actually incurred and expensed in 1993 *and* R&D costs expensed in 1993, though incurred and amortized prior to 1993. Commerce is wrong.

The court will sustain Commerce's remand determination if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994).

As the Court plainly emphasized in *Micron,* it is distortive and, indeed, punitive to base LG Semicon's total R&D figure on those costs that were expensed and incurred in 1993 *plus* those costs that were expensed in 1993, though incurred prior to 1993. This approach *"effectively* results in double counting" costs incurred by LG Semicon. *Micron,* No. 99–12, slip op. at 11 (CIT Jan. 28, 1999) (emphasis added).

Commerce maintains its approach does not result in double counting because Commerce "has never before included these particular R&D expenses [i.e., those expensed in 1993, yet incurred prior to that year] in [LG Semicon's] costs." *Remand Results,* at 5. Commerce is literally correct in that under its proposed methodology, the same expenses are not double counted, but this hyper-technical analysis misses the point. Commerce has taken a fully inclusive set of current period costs and lumped on a set of prior period costs. And, importantly, the prior period costs constitute a substantial portion of the total revised R&D figure because the remainder of amortized costs were expensed in full in 1993 due to an accounting change. Indeed, Commerce acknowledges that by adding the prior period costs "[t]his appreciably increases total R&D expenses." *Remand Results,* at 6. The court's review of the confidential *Remand Results* confirms this statement to be absolutely true. The increase in total R&D, resulting from the shift in methodology, is significant. On the facts of this case, the Court continues to find that by combining the costs that were currently expensed and the costs that were amortized, though expensed in full due to the accounting change, Commerce in effect double counted LG Semicon's total R&D costs. Commerce's approach distorts LG Semicon's total R&D beyond what might be considered historically accurate for a given period of time and, hence, does not remotely, much less reasonably, reflect the company's actual costs of production.

Commerce's principal concern in adopting the methodology used in the *Remand Results* appears to be that if previously incurred amounts are not included in the total R&D figure here, they will never be included in any review. This is a red herring. Many past expenses, including past production costs, might not be captured in any given review. To validate Commerce's reasoning would allow the agency to include past expenses simply because they were not captured in a previous review or investigation. The object of the cost of production exercise is not to capture all past expenses, but rather those expenses that reasonably and

accurately reflect a respondent's actual production costs for a period of review.

In the *Remand Results*, Commerce also expresses its concern that if it were to follow the Court's instruction, LG Semicon might again switch its accounting procedures to achieve favorable treatment for antidumping purposes. Commerce's concern in this regard is overstated. It makes little, if any, business sense to switch accounting systems on an annual basis; the Court is skeptical that a company might engage in such practice solely to ensure that more beneficial dumping calculations might inure.

Finally, plaintiff Micron argues that the revised methodology should be sustained because to do otherwise would result in an approach inconsistent with the methodology used to calculate purchased R&D. The Court does not agree. Review of the record shows that all of the purchased R&D LG Semicon expensed in 1993 was also incurred in 1993. *See Remand Results*, at 4 n.1; *see also Micron*, No. 99–12, slip op. at 10 n.3 (CIT Jan. 28, 1999).

To remedy Commerce's error, LG Semicon urges the Court to vacate the *Remand Results* and, instead, to reinstate and sustain the *Notice of Final Results of AD Administrative Review: DRAMs from the Republic of Korea*, 61 Fed. Reg. 20,216 (May 6, 1996). The Court recognizes that additional delay will result from a further remand and sympathizes with LG Semicon's frustration on this issue. Commerce's decision on remand has wasted the Court's time as well as that of the litigants. But, the proper course of action is to have the agency rectify its error in an expedited fashion. Therefore, Commerce shall conduct its second remand according to the following Order.

Upon consideration of Commerce's *Remand Results*, and the comments filed by parties to this action, upon all other papers and proceedings had herein, and upon due deliberation; it is hereby

ORDERED that the *Remand Results* are remanded to Commerce, which should revise its total R&D methodology to exclude R&D costs that were incurred prior to 1993, yet expensed in 1993 and, if necessary, recalculate the margin for LG Semicon;

ORDERED that Commerce shall file its *Remand Results* with the Clerk of the Court within thirty (30) days from the date of this Order. Any comment or responses by the parties to the Remand Results are due on or before five (5) days thereafter, and shall be limited to fifteen (15) pages. Any rebuttal comments are due on or before five (5) days thereafter, and shall again be limited to fifteen (15) pages; and it is further

Ordered that no extensions of time to this schedule will be granted.

(Slip Op. 99–52)

PILLSBURY COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–03–00161

(Dated June 23, 1999)

JUDGMENT

MUSGRAVE, *Senior Judge:* IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT defendant United States' revocation of (1) the authority of plaintiff The Pillsbury Company (Pillsbury) to use the Exporter's Summary Procedure (ESP) in its duty drawback claims, and (2) Pillsbury's blanket waiver of pre-export notification requirements for substitution unused merchandise/same condition drawback claims was contrary to law and void *ab initio*, and it is further;

ORDERED, ADJUDGED AND DECREED THAT any same condition drawback claims filed by Pillsbury concerning exports of fresh asparagus shall not be denied by defendant on the ground that Pillsbury did not provide defendant with advance notice of exportation of such goods.

(Slip Op. 99–53)

NORTH AMERICAN PROCESSING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–11–00769

Defendant, United States, moves this Court for an order to strike footnote 8 of plaintiff's, North American Processing Company's, post-trial memorandum. Plaintiff opposes the motion.

Held: Defendant's motion to strike footnote 8 of plaintiff's post-trial memorandum is granted.

(Dated June 25, 1999)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr. and *Christopher E. Pey),* New York, N.Y., for plaintiff.

David W. Ogden, Acting Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara S. Williams).*

MEMORANDUM OPINION AND ORDER

CARMAN, *Chief Judge:* Defendant, United States, moves for an order to strike footnote 8 of plaintiff's, North American Processing Company's,

post-trial memorandum.[1] Defendant argues footnote 8 contains references to a cause of action and evidence in support of that cause of action specifically dropped by plaintiff in its amended complaint and in the parties' pre-trial order granted by this Court. Plaintiff has filed a response to defendant's motion opposing the same, arguing the footnote merely raises a legal issue the Court should consider in reaching the "correct decision" as required under 28 U.S.C. § 2643(b). *See also Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997).

The underlying dispute in this case is the proper classification of imported merchandise under the Harmonized Tariff Schedule of the United States (HTSUS). Plaintiff challenges the United States Customs Service's classification of the merchandise at issue under subheading 0202.30.60, HTSUS (1992), as "meat of bovine animals, frozen, boneless, other." Plaintiff contends the merchandise is properly classifiable under subheading 1502.00.00, HTSUS, as "fats of bovine animals * * *." Defendant maintains Customs' classification is correct.

Motions to strike are generally not favored. *See, e.g., Beker Industries Corp. v. United States*, 7 CIT 199, 200–01, 585 F. Supp. 663, 665 (1984). The Court, however, has broad discretion to grant or deny motions to strike, *see id.*, and may, *inter alia*, grant a motion to strike where the court would be prejudiced or misled by the inclusion in the brief of improper material. *See Jimlar Corp. v. United* States, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986) (citing *Edge Import Corp. v. United States*, 82 Cust. Ct. 343, 344 (1979)).

In this case, plaintiff's amended complaint and the parties' pre-trial order specifically exclude the legal issue and argument raised in footnote 8 of plaintiff's post-trial memorandum as a cause of action before this Court. As the pre-trial order controls the course of the action of the case, the Court finds plaintiff's reference to and argumentation regarding the excluded legal argument in footnote 8 of plaintiff's post-trial memorandum was improper.

For the reasons stated above, defendant's motion to strike footnote 8 from plaintiff's post-trial memorandum is granted.

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[1] Motions to strike are considered by this Court pursuant to Rule 12(f) of the Rules of the United States Court of International Trade. Rule 12(f) states, in pertinent part, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

(Slip Op. 99–54)

NORTH AMERICAN PROCESSING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–11–00769

Plaintiff, North American Processing Company, challenges the United States Customs Service's (Customs) classification of the merchandise at issue under subheading 0202.30.60, Harmonized Tariff Schedule of the United States (HTSUS), as "meat of bovine animals, frozen, boneless, other," dutiable at a rate of 4.4¢/kg. Plaintiff contends the merchandise is properly classifiable under subheading 1502.00.00, HTSUS, as "fats of bovine animals * * *" and therefore should enter the United States at a dutiable rate of 0.95¢/kg. Defendant, United States, maintains Customs' classification is correct and requests this Court sustain the classification.

Defendant's motion for summary judgment, motion for rehearing, modification, and/or reconsideration of this Court's order denying defendant's motion for summary judgment, and motion *in limine* were denied. A bench trial followed.

Held: Plaintiff has not overcome the presumption of correctness attached to Customs' classification of the merchandise at issue and Customs correctly classified the merchandise at issue under subheading 0202.30.60, HTSUS. Therefore judgment is entered for the defendant.

(Dated June 25, 1999)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr. and *Christopher E. Pey),* New York, N.Y., for plaintiff.

David W. Ogden, Acting Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara S. Williams).*

OPINION

CARMAN, *Chief Judge:* Plaintiff, North American Processing Company (North American), is the importer of the subject merchandise. The merchandise at issue consists of bovine fat trimmings[1] containing 35% chemical lean[2] and 65% fat. Plaintiff challenges the United States Customs Service's (Customs) classification of the imported merchandise under subheading 0202.30.60, Harmonized Tariff Schedule of the United States (HTSUS), as "meat of bovine animals, frozen, boneless, other."[3] Plaintiff contends the merchandise at issue is properly classified under subheading 1502.00.00, HTSUS, as "fats of bovine animals * * *."[4] The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994) and, for the reasons that follow, enters judgment for the defendant.

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[1] A sales confirmation describes the imported product as "bovine fat trimmings." *See* Trial Transcript (Trial Tr.) at 67.

[2] "Chemical lean" indicates the result of an analysis where the fat content of a sample of imported merchandise is determined by chemical assay under standard laboratory terms. *See* Trial Tr. at 25.

[3] The relevant provision of the Harmonized Tariff Schedule of the United States (HTSUS) (1992) states:

0202	Meat of bovine animals, frozen:
0202.30	Boneless:
0202.30.60	Other 4.4¢/kg

[4] The relevant provision of the HTSUS (1992) states:

1502.00.00	Fats of bovine animals, sheep or goats, raw or rendered, whether or not pressed or solvent-extracted ..... 0.95¢/kg

BACKGROUND

On October 14, 1992, North American entered the merchandise at issue through the port of San Francisco. The merchandise at issue consists of bovine fat trimmings packaged in such a manner that the entire package consists of 35% "lean" and 65% "fat." The entry at issue was classified under subheading 1502.00.00, HTSUS, as "fats of bovine animals * * *," dutiable at a rate of 0.95¢/kg. The merchandise was liquidated as "no change" under this subheading on February 5, 1993 but was later reliquidated by Customs on February 26, 1993, under subheading 0202.30.60, HTSUS, as "meat of bovine animals, frozen, boneless, other," dutiable at a rate of 4.4¢/kg.

On May 26, 1993, plaintiff filed a protest, pursuant to 19 U.S.C. § 1514(c) (1988), challenging Customs' reliquidation of the merchandise under subheading 0202.30.60, HTSUS. Customs denied this protest on August 4, 1993, and plaintiff timely filed this action. On March 24, 1997, defendant filed a motion for summary judgment. Defendant's motion was denied in February 1998 because "[t]he parties do not agree on the degree to which the fat adheres to the meat, and this issue will require a factual finding by the Court." *North American Processing Co. v. United States*, 1998 WL 72811, at *2 (C.I.T. February 19, 1998) (footnote omitted). This Court further determined a dispute remained regarding how the packaging in which the merchandise was imported was labeled. Defendant subsequently moved for rehearing, modification, and/or reconsideration of this Court's order denying summary judgment. In the alternative, defendant moved *in limine* to exclude certain evidence. Defendant's motions were denied. A bench trial followed.

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff makes three main arguments in advancing its contention that the subject merchandise is properly classified under subheading 1502.00.00, HTSUS, "fats of bovine animals * * *." First, plaintiff claims the imported merchandise is *prima facie* classifiable as "fats of bovine animals * * *," under subheading 1502.00.00, HTSUS, as the imported merchandise consists of fat by its nature, is bought and used for its fat content, is described as "fat trimmings" in commercial documents, and fits within the common meaning of fat. Second, plaintiff asserts the imported merchandise should not be classified as "meat of bovine animals, frozen, boneless, other," as provided under subheading 0202.30.60, HTSUS, and as defined by the Chapter Notes for Chapter 2, HTSUS (Chapter Notes), and the Harmonized Commodity Description and Coding System Explanatory Notes for Chapter 2, HTSUS (Explana-

tory Notes)[5], because "fat" is excluded from the chapter[6], the imported merchandise is not suitable for human consumption at importation[7], and the "fat" does not necessarily "adhere[] to [the] meat."[8] Third, plaintiff contends, if, *arguendo*, the imported merchandise is *prima facie* classifiable as both "meat" and "fat," the "essential character" of the imported merchandise is contributed by the fat component, in accordance with Rule 3 of the General Rules of Interpretation (GRI).[9]

B. *Defendant*

Defendant makes three contentions in maintaining Customs properly classified the subject merchandise as "meat of bovine animals, frozen, boneless, other" under subheading 0202.30.60, HTSUS. First, defendant argues the imported merchandise is classifiable pursuant to the plain meaning of the statute. According to defendant, the definition of "meat" includes both "lean" and "fat."[10] As the parties agree that the merchandise at issue is 35% "lean" and 65% "fat," it is, according to defendant, indisputable that the imported merchandise consists of "lean" with "fat" and is therefore "meat" classifiable under subheading 0202.30.60, HTSUS.

Second, defendant contends the Chapter Notes and the Explanatory Notes to Chapter 2 of the HTSUS support a definition of "meat" which includes "lean" and "fat," and, thus, the merchandise falls within the classification of "meat" under 0202.30.60, HTSUS. According to defendant, the Chapter Notes and Explanatory Notes direct that "the only type of fat **not** covered by the provision for bovine meat is fat presented alone." (Def.'s Post-Trial Mem. of Law at 6 (Def.'s Mem.).) Thus, where, as here, fat is not presented alone but rather imported attached to the lean, the merchandise is properly classifiable as bovine meat. This is

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[5] The Harmonized Commodity Description and Coding System Explanatory Notes (Explanatory Notes) constitute the World Customs Organization's official interpretation of the HTSUS. *See Baxter Healthcare Corp. of Puerto Rico v. United States*, 998 F. Supp. 1133, 1140 n.4 (CIT 1998). While not legally binding on the parties, the Explanatory Notes are useful in ascertaining the classification of the merchandise at issue. *See id.* (quoting *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995) ("While the Explanatory Notes do not constitute controlling legislative history, they do offer guidance in interpreting HTSUS subheadings.")); *see also Rollerblade, Inc. v. United States*, 112 F.3d 481, 486 n.3 (Fed. Cir. 1997) (Although they are not controlling legislative history, the Explanatory Notes are "nonetheless intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings.").

[6] Chapter Note 1(c) for Chapter 2, HTSUS (Chapter Notes), specifically states, "This chapter does not cover: (c) Animal fat, other than products of heading 0209 (chapter 15)[.]" Heading 0209, HTSUS, provides for "pig fat * * * and poultry fat" but is not otherwise relevant to this case.

[7] Chapter Note 1(a), Chapter 2, HTSUS, states, in pertinent part, "This chapter does not cover: (a) Products * * * unfit or unsuitable for human consumption[.]"

[8] The general section of the Explanatory Notes for Chapter 2, HTSUS, states, "Animal fat presented separately is **excluded (Chapter 15)** * * * but fat presented in the carcass or adhering to meat is treated as forming part of the meat."

[9] Rule 3 of the General Rules of Interpretation (GRI), HTSUS, states, in relevant part, "[w]hen, by application of rule 2(b) [referring to goods consisting of more than one material or substance] or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [stating headings which provide the most specific description shall be preferred to headings providing a more general description], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

[10] Defendant points to the definition of "meat" in Webster's New Collegiate Dictionary (1979) as "animal tissue used as food." Defendant also points to the definitions of "meat" under the United States Department of Agriculture's (USDA) regulations for the Food Safety and Inspection Service as "part of the muscle of any cattle * * * which is skeletal * * *, *with or without the accompanying and overlying fat*[.]" 9 C.F.R. § 301.2 (West 1999) (emphasis added). Additionally, defendant states the undisputed evidence at trial demonstrates the term "meat" includes "lean" and "fat," citing witness testimony and documentary evidence presented at trial.

true "even if the percentage of fat in the product surpasses the percentage of [lean] component[.]" (Def.'s Mem. at 6.) Defendant contends its position is supported further because the merchandise at issue is fit and suitable for human consumption as considered by the Chapter Notes.[11]

Defendant also argues the imported merchandise is not classifiable as "fat" under subheading 1502.00.00, HTSUS, as the imported merchandise is "fat trimmings," a product distinct from "beef fat." Defendant sites testimony of Rod McNally, Vice President of Industrial Sales, South American Meat Products Company, indicating "beef fat" and "fat trimmings" are different products and not interchangeable. According to Mr. McNally, "beef fat" is fat and must be so labeled on the finished product; "fat trimmings," however, are meat and would therefore be labeled "beef" as an ingredient in a product which contained the imported merchandise. Moreover, defendant contends, the United States Department of Agriculture's (USDA) standards consider "fat trimmings" which are more than twelve percent "lean" to be "meat" rather than "fat."

Finally, defendant asserts, in the alternative, if GRI 3 were examined, the "essential character" of the imported merchandise is "lean" not "fat." Defendant initially argues GRI 3 is inapplicable because the Chapter Notes and Explanatory Notes are sufficient to classify the imported merchandise pursuant to GRI 1. Defendant also contends the merchandise is not *prima facie* classifiable under two or more headings, a prerequisite for applying GRI 3. Even if, however, GRI 3 were examined, defendant argues the merchandise would still be classifiable as bovine meat as the critical component of the imported merchandise is the lean component since it is the percentage of lean which determines the price of the merchandise. Also, defendant argues, a purchaser buys the imported merchandise based on the percentage of lean, not fat. Accordingly, the lean portion constitutes the "essential character" of the product.

Standard of Review

Determining whether imported merchandise has been classified under an appropriate tariff provision involves a two step process: (1) ascertaining the proper meaning of terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997) (citing *Intel Singapore, Ltd. v. United States*, 83 F.3d 1416, 1417–18 (Fed. Cir. 1996)). The first step is a question of law; the second, a question of fact. *See id.*; *see also Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995).

By statute, Customs' classification decisions are presumed to be correct, and the party challenging the classification has the burden of proving otherwise. *See* 28 U.S.C. § 2639(a)(1) (1994). While the statute

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[11] Note 1(a), Chapter 2, HTSUS, states, in relevant part, "This chapter does not cover: (a) Products * * * unfit or unsuitable for human consumption[.]"

provides Customs' decisions with a presumption of correctness, the presumption "is a procedural device that is designed to allocate, between the two litigants to a lawsuit, the burden of producing evidence in sufficient quantity." *Universal Elecs., Inc.*, 112 F.3d at 492 (emphasis omitted). While the presumption of correctness "carries force on any factual components of a classification decision," it "carries no force as to questions of law," which this Court reviews *de novo*. *Id.*

The Court reviews Customs' classification decisions *de novo* under 28 U.S.C. § 2640(a)(1) (1994) and is required to reach the correct result. *See* 28 U.S.C. § 2643(b) (1994); *see also Jarvis Clark Co. v. United States*, 733 F.2d 873, 880 (Fed. Cir. 1984) (finding once plaintiff establishes Customs' classification is incorrect, the Court has a duty "to find the correct answer" or remand for further proceedings). In determining whether the importer has overcome the statutory presumption of correctness, the court must consider whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co.*, 733 F.2d at 878.

DISCUSSION

A. *The Physical Nature and Description of the Imported Merchandise*

After hearing the evidence offered *de novo* at trial and reviewing the papers of the parties, the Court makes the following findings. First, the Court finds the merchandise at issue is edible at importation. Mr. McNally testified it is possible to cook the imported merchandise and eat it. *See* Trial Transcript (Trial Tr.) at 88. Mr. McNally also testified the imported merchandise is edible specifically at importation. *See* Trial Tr. at 89. Further, Mr. McNally and Peter Maloney, in charge of meat importation and distribution at Louis Dreyfus Corporation, testified the imported merchandise is ultimately used in products intended for human consumption. *See* Trial Tr. at 79 (used in meat blocks for chili), 43 (used in sausages and hamburgers). Also, the Court notes James B. Sinclair, Import Coordinator for the USDA's Food, Safety and Inspection Service, opined the merchandise "is edible and * * * suitable for human consumption." *See* Trial Tr. at 129. The Court finds the witnesses' testimony to be persuasive and concludes the imported merchandise is edible at importation.

Second, the Court finds, and the parties do not dispute, the imported merchandise consists of 35% "lean" and 65% "fat." The Court notes the vast majority of the sample provided to the Court which represents an accurate characterization of the imported merchandise consists primarily of pieces of "lean" and "fat" with varying percentages of the constituent parts in each. *See* Plaintiff's Exhibit 11 and Defendant's Exhibit E. The defendant's exhibit has only "one little piece" that is "fat" alone. *See* Trial Tr. at 167.

Third, the Court finds the packaging in which the merchandise was imported was labeled "A-Fat-Trim." The Court notes Mr. McNally testified a purchase order similar to the purchase orders used by North American indicated the imported merchandise at issue was described as

"A-Fat-Trimming." *See* Trial Tr. at 65. Further, Mr. McNally testified Exhibit 4 indicated the boxes in which the imported merchandise was transported were to be marked "A-Fat-Trim." *See* Trial Tr. at 66. In Mr. McNally's experience, such instructions are normally followed. *See* Trial Tr. at 66. The Court finds Mr. McNally's testimony persuasive. Having made these findings, the Court now turns to its determinations on the questions of law raised in this matter.[12]

B. *Scope of the Term "Meat of Bovine Animals, Frozen, Boneless, Other"*

The controlling issue in this case is the scope of the phrase "meat of bovine animals, frozen, boneless, other," under subheading 0202.30.60, HTSUS. Classification of merchandise under the HTSUS is performed in accordance with the GRI, taken in order. *See, e.g., Baxter Healthcare Corp. of Puerto Rico v. United States*, 998 F. Supp. 1133, 1139 (CIT 1998). GRI 1 states, in relevant part, "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. When a tariff term is not clearly defined by either the HTSUS or legislative history, the correct meaning of a term is usually resolved by looking to its common and commercial meaning. *See, e.g., Myers v. United States*, 969 F. Supp. 66, 73 (CIT 1997) (citing *W.Y. Moberly, Inc. v. United States*, 924 F.2d 232, 235 (Fed. Cir. 1991)). In construing such terms, the court may "rely upon its own understanding, dictionaries and other reliable sources." *Medline Indus., Inc.*, 62 F.3d at 1409 (citing *Marubeni Am. Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994)).

Finding the term "meat" is not clearly defined by the headings and subheadings of Chapter 2, HTSUS, the Court notes the general section of the Explanatory Notes for Chapter 2 limits "meat" within the chapter to "meat in carcasses * * * suitable for human consumption." Additionally, the Chapter Notes indicate Chapter 2 does not cover "[p]roducts * * * unfit or unsuitable for human consumption." Case law finds a product is suitable for human consumption[13] when the product is habitually eaten as an ingredient in food, even though the product may not be eaten by itself at importation. *See United States v. P. John Hanrahan, Inc.*, 45 C.C.P.A. 120 (1958) (holding wheat gum gluten classifiable as an edible preparation for human consumption even though it had to be mixed with other ingredients and cooked before actual eating, since, as imported, it was capable of being eaten). *Compare Cook v. United States*, 1962 WL 10581 (Cust. Ct. July 10, 1962) (holding wheat, as imported, was commercially unfit for human consumption although after importation could be blended with wheat which was fit for human consumption and therefore make the wheat fit for human consumption;

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[12] This Court finds the issue regarding adherence between "fat" and "meat" to be inconclusive. Mr. Sinclair testified the adherence relationship between the "fat" and the "meat" is "interchangeable." *See* Trial Tr. at 170–71. As neither party provided evidence to the contrary, the Court finds the statement by Mr. Sinclair insufficient to determine the adherence relationship.

[13] Although case law refers to food which is "edible," the Court finds the term synonymous with "suitable for human consumption" as the definition of "edible" is "suitable by nature for use as food esp. for human beings." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 722 (1981).

however, parties stipulated during trial that wheat as imported was unfit for human consumption, and the court would not disturb that stipulated fact). While the Chapter Notes and Explanatory Notes clarify what type of product fits within Chapter 2, HTSUS, they are not helpful in identifying the specific definition of "meat." Thus, the Court turns to the common and commercial meaning of the term "meat."

The Court finds the common and commercial meaning of the term "meat" is broad and encompasses both "lean" and "fat" constituent elements. The Court notes Mr. McNally testified the combination of "lean" and "fat" was considered "meat." *See* Trial Tr. at 116.[14] Additionally, Mr. Sinclair opined the "fat" and "lean" components together were called "meat."[15] *See* Trial Tr. at 145–46. Finally, the Court notes the testimony of Mr. Sinclair also stated the USDA recognizes that trimmings with "12 percent or more lean [are] considered meat[.]" Trial Tr. at 151. The Court finds the testimony of these individuals persuasive.

This finding is supported by the definition of "meat" in the USDA regulations. The USDA regulations define "meat," in part, as "[t]he part of the muscle of any cattle * * * with or without the accompanying and overlying fat * * *." Food and Safety Inspection Service, Department of Agriculture, 9 C.F.R. § 301.2 (West 1999). While the USDA's regulations are not controlling, the Court finds the USDA's definition of "meat" persuasive.[16]

Plaintiff argues that the purpose and use of the imported merchandise should control this Court's determination of the correct classification of the merchandise at issue. Plaintiff points to this Court's decision in *United States v. Quon Quon Co.*, 46 C.C.P.A. 70, 73 (1959) (considering use in *eo nomine* classifications where it is included in the definition of the merchandise at issue), to support its argument. Plaintiff argues the imported merchandise in this case is bought and used for its fat content, *see* Trial Tr. at 91–93, and used to mix with other ingredients to raise the level of fat in the product, *see* Trial Tr. at 137. Thus, according to plaintiff, the imported merchandise should be classified under subheading 1502.00.00, HTSUS, as "fats of bovine animals * * *."

Generally, use is not a criterion in determining whether merchandise is classifiable under an *eo nomine* designation where the provision is clear and unambiguous, without any suggestion that use should influence the classification.[17] *See* Ruth Sturm, CUSTOMS LAW & ADMINISTRATION § 53.2, 11–12 (Supp. 1995). "Use," however, may be considered by

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[14] The Court notes Mr. McNally also testified a slice of the "red portion" of the merchandise at issue could be referred to as either "lean" or "a piece of meat." *See* Trial Tr. at 117. This statement does not alter the Court's finding regarding the definition of "meat." In determining a common and commercial meaning, the Court considers all evidence before it. Here, the Court finds, on balance, "meat" is defined as a composite of "lean" and "fat."

[15] The Court notes Mr. Sinclair does not protest the interchangeable use of the terms "meat" and "lean" on cross examination by plaintiff's counsel. *See* Trial Tr. at 166. The Court finds, however, Mr. Sinclair's testimony in toto recognizes a definition of "meat" which contains "lean" and "fat" constituent elements.

[16] *See Foodcomm Int'l v. United States*, 19 CIT 1421, 1427, 914 F. Supp. 548, 553 (1995) (finding the definition of "beef" under the USDA's regulation relevant to the definition of "beef" for Customs' classification purposes).

[17] It appears the heading at issue, "meat of bovine animals, frozen, boneless, other," is an *eo nomine* provision as it describes a commodity by a specific name, "meat," well known in commerce. *See United States v. Paul M.W. Bruckmann*, 65 C.C.P.A. 90, 94 n.8, 582 F.2d 622 (1978).

the Court in determining the correct classification of imported merchandise if "use" is part of the definition of the classification. *See, e.g., Quon Quon*, 46 C.C.P.A. at 73 (considering "use" of the imported product where the product is defined as merchandise "used for the purpose of holding, protecting, or carrying any commodity").

Here, "meat" is defined as "animal tissue *used as food*." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1400 (1981) (emphasis added). Therefore, the way in which the imported merchandise is used may be considered by this Court. This consideration, however, is merely a factor in the Court's determination of the correct classification and is not controlling. *See Myers*, 969 F. Supp. at 72.

C. *The Merchandise at Issue Is Properly Classified as "Meat of Bovine Animals"*

The determination of whether the merchandise at issue falls within the tariff provision "meat of bovine animals, frozen, boneless, other" is a factual question, and therefore Customs' classification is entitled to a presumption of correctness. *See Universal Elecs., Inc.*, 112 F.3d at 491 (noting precedent establishes "the decision of Customs is presumed to be correct").

The Court finds the plaintiff has not produced sufficient evidence to overcome the presumption of correctness attached to Customs' classification. The Court is persuaded the subject merchandise is properly classified under subheading 0202.30.60, HTSUS, by, among other things, the evidence presented at trial. According to industry representatives and in accordance with the findings of this Court, the term "meat" encompasses both "lean" and "fat." Here, the parties do not dispute the imported merchandise consists of 35% "lean" and 65% "fat." Under the broad definition of the term "meat" ascertained at trial, the Court concludes the merchandise at issue fits within this definition. Thus, the Court finds the merchandise at issue is properly classified under subheading, 0202.30.60, HTSUS, as "meat of bovine animals, frozen, boneless, other."

The Court also finds the labeling of the imported merchandise informative. According to Mr. McNally, "A-Fat-Trim" means "fat trimmings." *See* Trial Tr. at 66. "Fat trimmings" are distinct from "beef fat." *See* Trial Tr. at 76. While "beef fat" must be labeled as "beef fat" on food labels, "fat trimmings" are labeled "beef." *See* Trial Tr. at 76–77. The Court finds the labeling of the imported merchandise adds weight to the Court's determination that the imported merchandise is correctly classified under subheading 0202.30.60, HTSUS.

Even considering use as a factor in determining the classification of the imported merchandise, the product is properly classified as "meat of bovine animals, frozen, boneless, other" under subheading 0202.30.60, HTSUS. The reference to "use" in the definition of "meat" requires that the product be "used as food." According to the testimony of the witnesses at trial, the imported merchandise is used as food. Witnesses testified that the imported merchandise is mixed with other ingredients to

make food products. *See* Trial Tr. at 79 (used in meat blocks for chili), 43 (used in sausages and hamburgers). Additionally, although the imported merchandise may be used as "fat," in the sense that the "fat" portion of the merchandise "fattens" leaner meat, the lean portion of the merchandise is also important and is used to provide texture for food products. *See* Trial Tr. at 81. Hence, even considering the product's use, it is properly classified as "meat."

The Court finds the Chapter Notes and Explanatory Notes provide additional support for the Court's determination the plaintiff has not overcome the statutory presumption of correctness. The Court is persuaded the merchandise at issue is edible, and therefore suitable for human consumption, at importation from the evidence presented at trial by industry representatives. This finding comports with the definition of meat provided in the Chapter Notes and Explanatory Notes for Chapter 2, HTSUS, and case law. Thus, the Court concludes the merchandise at issue is correctly classified under subheading, 0202.30.60, HTSUS, as "meat of bovine animals, frozen, boneless, other."

The Court also finds the imported merchandise cannot be classified as "fats of bovine animals * * *." While neither the statute nor the Chapter Notes for Chapter 15, HTSUS, provide an adequate definition of the term "fats of bovine animals," Webster's Third New International Dictionary defines "fat" as:

> a part of the tissues of an animal that consists chiefly of cells distended with greasy or oily matter * * * the oily or greasy substance that makes up the bulk of the cell contents of adipose tissue and occurs in smaller quantities in many other parts of animals and in plants * * * any of a class of neutral solid, semisolid, or liquid chemical compounds that are insoluble in water but soluble in ether and other organic solvents * * *."

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 827 (1981). The dictionary definition of "fat" does not appear to include a "lean" component. Further, the Explanatory Notes for Chapter 2 indicate only "[a]nimal fat presented *separately*" should be classified under Chapter 15 (emphasis added). Since the imported merchandise is a composite of "fat" and "lean" and not independent pieces of "fat," this Court finds the merchandise cannot be classified as "fats of bovine animals * * *" under subheading 1502.00.00, HTSUS.[18]

As the Court has determined the merchandise at issue is properly classified under subheading 0202.30.60, HTSUS, based on the plain meaning of the statute, the Chapter Notes, the common and commercial definition of the term, and the Explanatory Notes, the Court finds it unnecessary to consider fully plaintiff's "essential character" argument. The "essential character" argument under GRI 3 applies only when an

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[18] To the extent that a single piece of "fat" exists in the sample merchandise, this Court finds the piece is an immaterial part of the merchandise as a whole and therefore *de minimus* and irrelevant to this Court's classification analysis. *See Varsity Watch Co. v. United States*, 34 C.C.P.A. 155 (1947) (concluding certain amounts of an ingredient may be ignored for classification purposes if it did not enhance the value of the merchandise, had no purpose in commerce, or was an unintentional adulterant).

article is *prima facie* classifiable under two or more headings. *See, e.g., Ciba-Geigy Corp. v. United States*, 1998 WL 928572, at *8 (C.I.T. Dec. 29, 1998); *see also American Bayridge Corp. v. United States*, 35 F. Supp.2d 922, 933 (CIT 1998). Case law suggests an article is *prima facie* classifiable under two headings where the merchandise either is imported in separate parts, *see, e.g., Better Home Plastics Corp. v. United States*, 119 F.3d 969 (Fed. Cir. 1997) (finding shower curtain composed of two parts and therefore potentially classifiable as either liner or as textile curtain), or is classifiable under either of two headings, *see, e.g., Orlando Food Corp. v. United States*, 140 F.3d 1437 (Fed. Cir. 1998) (holding imported sauces could be classified as either sauce or as components of sauce). As the Court finds the product at issue is only classifiable under one subheading and as the merchandise is imported in solid blocks of 35% "lean" and 65% "fat," the Court finds the "essential character" analysis does not apply to this case.

The Court finds plaintiff's "commingling of goods" argument under General Note 5(d) of the HTSUS[19] raised by plaintiff at trial and considered by this Court pursuant to its duty under 28 U.S.C. § 2643(b) to "reach the correct decision" to be inapplicable. *See Jarvis Clark*, 733 F.2d at 873. General Note 5(d) states, in pertinent part, if "the value of the commingled goods is less than the aggregate value would be if the shipment were segregated; * * * the shipment is not capable of segregation without excessive cost and will not be segregated prior to its use in a manufacturing process or otherwise; and * * * the commingling was not intended to avoid the payment of lawful duties * * *" then the goods "shall be considered for all customs purposes to be dutiable at the rate applicable to the material present in greater quantity than any other material."

The Court reads the term "commingled goods" to apply to two or more goods shipped together whose component parts do not constitute a single entry. *See, e.g., Wakunaga of Am. Co., Ltd. v. United States*, 1 CIT 302 (1981) (finding where imported good viewed as single product, provisions for elements of the product irrelevant for the purposes of import classification). As noted previously, the Court finds the merchandise at issue is classifiable only as a single product, "meat." The Court also notes the merchandise was imported under contract as a single product with 35% chemical lean.[20] *See* Complaint, ¶ 8. Thus, the Court concludes the merchandise was purchased and imported as a single, specific product, classifiable as a single entry. Therefore, the Court finds plaintiff's "commingling of goods" argument is inapplicable.

CONCLUSION

For the reasons stated above, the Court finds plaintiff has not overcome the statutory presumption of correctness attached to Customs'

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[19] General Note 5(d) existed in 1992 when the merchandise at issue was imported. Therefore, this Court applies the language of the statute in force at the time of the importation. The same provision currently exists as General Note 17(d) (1998).

[20] 35% chemical lean indicates a ratio of 35% lean to 65% fat.

classification of the merchandise at issue and holds that Customs correctly classified the merchandise at issue under subheading 0202.30.60, HTSUS. Therefore, Customs' classification and assessment of duties is sustained. Accordingly, this action is dismissed.

(Slip Op. 99–55)

FABIL MANUFACTURING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00174

[Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted. Judgment entered for defendant.]

(Dated June 28, 1999)

Irving A. Mandel; *Thomas J. Kovarcik*, of counsel, for plaintiff.

David W. Ogden, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Aimee Lee*, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Chi S. Choy)*, of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* This case comes before the Court on cross-motions for summary judgment. Plaintiff Fabil Manufacturing Co. ("Fabil") challenges defendant United States Customs Service's ("Customs") refusal to grant an allowance in the appraised value of certain imported jackets under 19 C.F.R. § 158.12. Specifically, Fabil asserts that because the merchandise contained latent defects at the time of importation, Customs should have granted Fabil an allowance in value and refund of duties pursuant to section 158.12. Fabil claims the defective merchandise was a total loss and requests an allowance in value equal to the total duties paid on the imported merchandise.

Because Fabil cannot establish (1) that the imported merchandise is the same as the merchandise returned, or (2) the actual diminution in value due to the alleged defects, summary judgment is granted in favor of Customs. The Court exercises jurisdiction in this matter under 28 U.S.C. § 1581(a) (1994).

I.

BACKGROUND

While in business, Fabil imported outerwear, including jackets for children.[1] In 1987, Fabil entered negotiations with Murjani, Inc., a licensee of the Coca-Cola Company, for the manufacture and sale of outerwear jackets bearing the Coca-Cola logo. The parties agreed that Fabil could produce and sell 300,000 jackets with the Coca-Cola logo. According to Fabil, it then contacted a Korean manufacturing agent, Booyang, Ltd., to identify manufacturing sources. *See* Aff. of Robert Hammer, Vice President of Fabil ("Hammer Aff."), ¶ 5. Fabil claims it provided manufacturing specifications for the jackets to Booyang, including colors, styles, sizes, and, most importantly, that the jackets be machine washable. Fabil also represents that Booyang provided samples from prospective manufacturers, which Fabil had tested by "the U.S. Testing Laboratories in New Jersey." Hammer Aff. ¶ 6.1. Fabil claims the laboratory tests showed that after the jackets were machine washed, the colors in the jackets—including the Coco-Cola logos—did not run. In other words, Fabil claims the sample jackets were "color fast." *Id.*

Fabil then ordered 300,000 jackets from Hop Yick Garment Factory and Centripower Company Ltd., both doing business in Hong Kong, and from one supplier in Korea, Samdo Trading Co. Ltd. *See* Hammer Aff. ¶ 7. Fabil entered the merchandise between June and September, 1987. Fabil claims the total entered value of the merchandise was $1,706,970.[2] *See id.* at ¶ 9. Once entered, Fabil sold the jackets to department stores, including Dayton Hudson, Dillard's, and Bullocks. But, Fabil asserts that customers returned the jackets because they were latently defective. Specifically, Fabil claims the jackets and the Coco-Cola logos were not colorfast because, when washed, the jackets' logos disintegrated and the colors therein ran together. *See id.* Ex. D.

In May, 1988, Fabil filed its first claims with Customs, alleging that because the merchandise was defective, it was due an allowance in duties paid. Customs denied Fabil's protests in 1994. Fabil then filed a timely appeal to this court. Fabil claims that because all 300,000 imported jackets were defective, it was forced to dispose of the merchandise at a total loss. To account for the defective nature of the imported merchandise, Fabil seeks an allowance in value equal to the amount of total duties paid on all entries.

II.

STANDARD OF REVIEW

This case is before the Court on cross-motions for summary judgment. The court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any mate-

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[1] Fabil ceased doing business in 1989. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J., at 7.

[2] Customs claims that the total F.O.B. value of the entered merchandise was approximately $1,900,000. *See* Def.'s Resp. to Pl.'s Statement of Undisputed Facts Pursuant to USCIT R. 56(i), ¶ 14.

rial fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Summary judgment is not appropriate, however, when a party presents "a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (citation omitted). And, a party opposing summary judgment must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions to file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Caterett*, 477 U.S. 317, 324 (1986) (citing Fed. R. Civ. P. 56(e)).

III.

Discussion

Under 19 C.F.R. § 158.12, a protestant qualifies for an allowance in dutiable value where (1) imported goods are determined to be partially damaged at the time of importation, and (2) the allowance sought is commensurate to the diminution in value caused by the defect. Specifically, section 158.12 provides as follows:

> Merchandise partially damaged at time of importation. (A) *Allowance in value.* Merchandise which is subject to ad valorem or compound duties and found by the district director to be partially damaged *at the time of importation* shall be appraised in its condition as imported, *with an allowance made in the value to the extent of the damage.*

19 C.F.R. § 158.12 (emphasis added). To qualify for an allowance, a protestant must satisfy *both* elements of the above provision by clear and convincing evidence. *See Samsung Elecs. America, Inc. v. United States*, 23 CIT ____, ____, 35 F. Supp.2d 942, 946 (1999). The Court therefore reviews whether Fabil's proffered evidence satisfies both elements of the allowance provision.

Upon review, the Court grants Customs' motion for summary judgment. As an initial matter, Fabil is able to establish that a genuine issue of material fact exists as to whether it actually ordered defect-free merchandise—a precondition for a section 158.12 claim. Beyond this, however, Fabil's claim fails because it is unable to establish an issue of material fact that would indicate it could satisfy either element of section 158.12. First, Fabil is unable to show that the imported merchandise for which it seeks an allowance is the same as that which was returned as defective. Fabil offers no evidence to suggest that it can link the allegedly defective merchandise to specific entries. Second, Fabil's claim fails because it offers no measure of precision upon which an appropriate allowance in value can be derived. Consequently, Fabil's motion for summary judgment fails, and defendant's cross-motion for summary judgment prevails.

A. *A Material Issue of Fact Exists As To Whether Fabil Ordered Defect-Free Merchandise.*

Fabil claims it ordered colorfast jackets from three foreign suppliers. Fabil maintains this fact is undisputed and points to the Hammer affidavit as support. Customs denies Fabil's claim for lack of knowledge and argues that summary judgment should be granted in its favor because Fabil cannot establish that it ordered defect-free merchandise.

As a preliminary matter, Fabil must establish that it actually ordered colorfast jackets. If Fabil cannot establish that it ordered colorfast jackets, the Court cannot determine whether the merchandise was actually defective and, consequently, whether an allowance is due Fabil. This Court was presented with the same question of whether an importer actually contracted for defect-free merchandise in *Samsung Electronics America, Inc. v. United States*, 19 CIT 1307, 904 F. Supp. 1403 (1995). There, the Court held the importer anticipated that some merchandise would be defective and, thus, ordered a mix of defect-free and defective merchandise. *See Samsung*, at 1309, 904 F. Supp. at 1405. The Federal Circuit reversed. *See Samsung Elecs. America, Inc. v. United States*, ____ Fed. Cir. (T) ____, 106 F.3d 376 (1997) *("Samsung II")*. Specifically, the Federal Circuit found the sales contracts included Servicing Agent Agreements, which implied that the importer ordered defect-free merchandise and insured against the inevitability of defects with the inclusion of the service agreements. *Samsung II*, at ____, 106 F.3d at 379. The Federal Circuit also considered the existence of consumer warranties as evidence that defect-free merchandise was ordered. *Id.* And, the Federal Circuit noted that, given the close relationship between the importer and its parent, the foreign supplier, "it [made] no commercial sense for Samsung to purposefully deal in defective goods." *Id.*

Customs argues that, unlike *Samsung*, there is no sales contract for the Court to interpret here. Because there is no contract, Customs maintains that Fabil has failed to establish that it actually ordered defect-free merchandise. Customs is correct, in part: Fabil offers no evidence other than the Hammer affidavit to support the assertion that it specifically contracted for colorfast jackets. Yet, an affidavit alone is sufficient to defeat a motion for summary judgment if it designates specific facts showing there exists a genuine issue for trial. *See* USCIT R. 56(d); *see also Celotex*, 477 U.S. at 324. Here, the argument that Hammer's affidavit fails to designate facts specific enough to establish what Fabil actually contracted for, is not without merit. *Cf. Samsung II*, at ____, 106 F.3d at 381 (Mayer, C.J., dissenting) (concluding that plaintiff's "self-serving assertions [in an affidavit] add nothing to our understanding of the contract or to the parties' contemporaneous intentions"). Specifically, the Hammer affidavit does not indicate whether the contracts were oral or written, or whether the contracts even included manufacturing specifications. But, for the reasons set forth below, the Court finds that the affidavit ultimately does raise a genuine issue of material fact as to whether Fabil actually ordered defect-free merchandise.

As noted above, the Hammer affidavit asserts that Fabil actually contracted for the purchase of colorsafe jackets. *See* Hammer Aff. ¶ 10. And, on summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *See Ugg Int'l*, at 83, 813 F. Supp. at 852. Within this framework, because the terms of the contract obviously could resolve what was actually ordered, the affidavit's simple assertion that Fabil contracted for color-fast jackets is sufficient to create an issue of material fact. At trial, the parties could elicit testimony from the affiant, as well as the foreign suppliers, to clarify the terms of the contract, including what, if any, manufacturing specifications were included.

Importantly, the affidavit also successfully raises issues of fact other than the precise terms of the contract, that bear on whether Fabil ordered colorfast jackets. For example, the affidavit suggests that Fabil's U.S. customers anticipated receiving colorfast jackets and, as support, notes that Fabil ordered machine-washable labels for the jackets. *See* Hammer Aff. at ¶¶ 10, 12, and Ex. C. While not entirely relevant to the terms of Fabil's contracts with the foreign suppliers, this specific assertion nevertheless informs whether Fabil actually ordered colorfast jackets. That is, testimony from the affiant, the foreign suppliers, or even the U.S. customers, might help define the commercial realities of the sale, such as whether it would make economic sense to order machine-washable labels for jackets that were not in fact machine washable. Therefore, when viewed in its entirety, the affidavit raises genuine issues of material fact as to what Fabil actually ordered from the three foreign suppliers. This analysis is consistent with the approach taken in *Samsung II*, where the Federal Circuit looked beyond the contract to ascertain if plaintiff ordered defect-free merchandise. *See id.* at ____, 106 F.3d at 379 (finding that consumer warranties and commercial reality, in addition to the terms of the contract, indicated plaintiff ordered defect-free merchandise). Accordingly, Customs' motion for summary judgment is denied in this respect.

B. *Fabil Fails to Establish that the Imported Merchandise Is the Same As the Merchandise Returned.*

Fabil's allowance claim nonetheless fails because it cannot establish that the imported merchandise for which it seeks an allowance is the same as the merchandise it claims is defective. Specifically, Fabil offers no method to tie the allegedly defective merchandise to any entries or group of entries. Without this basic proof, the Court (and Customs) cannot determine whether contested merchandise actually contained a defect "at the time of importation." 19 C.F.R. § 158.12. Thus, Fabil's allowance claim must fail.

Fabil claims that when its major U.S. customers discovered the manufacturing defects in the jackets, they returned them to Fabil. *See* Pl.'s Br. in Supp. of Mot. for Summ. J., at 6. Fabil relies on the Hammer affidavit to support this general assertion. *See* Hammer Aff. ¶ 12; *but see* Letter from S. Ronay (Customs Consultant for Fabil) to Area Director of

Customs, U.S. Customs Service, dated May 17, 1988 (stating only that "*[m]uch* of the merchandise was returned to the importer by its customers due to the fact that, after washings the color ran" (emphasis added)). At first blush, Hammer's general assertion that *all* merchandise was returned as defective alone might appear sufficient to survive summary judgment. Fabil, however, has indicated that because the company went out of business in 1989, it cannot provide additional records relevant to the transactions at issue in this case. *See* Pl.'s Reply Mem., at 5 ("[T]he absence of alternative proof is explained by the fact that Fabil is no longer in business."). Consequently, Fabil cannot provide concrete evidence that its U.S. customers actually returned jackets—much less *all* the jackets—because they were not colorfast. For example, Fabil fails to indicate that it could provide letters from customers, describing the merchandise ordered and the merchandise returned.

Moreover, even if the Court were convinced that Fabil could prove that all jackets were returned because they were not colorfast, Fabil offers no evidence to suggest that it could tie the returns to a particular entry or group of entries. Indeed, Fabil does not even suggest, either in the affidavit or elsewhere, that it has internal records, which catalog the reasons for returns or the number of jackets actually returned. Nor does it suggest that it has internal records that might in some manner link the returned merchandise to the imported merchandise with any measure of reliability. Therefore, because plaintiff utterly fails to designate specific facts that indicate it might be able to prove (1) that all merchandise was returned, (2) that all returned merchandise was defective, and (3) that all returned merchandise was the same as the imported merchandise, the Court grants Customs' motion for summary judgment. To do otherwise would set a dangerous precedent, whereby importers might be able to claim an allowance in value for defective merchandise simply by asserting that merchandise was either returned or otherwise found to be defective and by pointing to an entry that matches the merchandise's description.

C. *Fabil Fails to Establish the Diminution in Value of the Imported Merchandise.*

Finally, Fabil's claim fails because the company cannot demonstrate with any precision what the claimed allowance in value should be for the defective merchandise. In particular, Fabil states that it donated some of the merchandise to various charitable organizations, including the Salvation Army, Goodwill Industries, and the National Council of Jewish Women. *See* Hammer Aff. ¶ 13. Fabil asserts that it discarded the remainder of the merchandise without compensation, resulting in a total loss. *See id.*

Fabil thus asserts that it donated some merchandise to charitable organizations, yet then claims the merchandise was a total loss. Without more, the Court cannot determine if Fabil derived any value from its charitable contributions. For instance, it is unclear whether Fabil subsequently took a deduction on its taxes for the contributions. Fabil pro-

vides no receipts for its donations to these charitable organizations, nor does it offer any relevant tax returns. And, in its affidavit, Fabil offers no indication that it has any receipts or tax returns, much less that it could prove the actual loss with the specificity needed to sustain an allowance claim. Also, as noted earlier, Fabil has indicated that it has no additional records relevant to the transactions at issue. *See* Section III.B *supra*. Fabil thus fails to designate specific facts, either in the Hammer affidavit or elsewhere, to suggest that it is possible to calculate the actual loss.

Moreover, Fabil offers no evidence to suggest that any diminution in value due to the claimed defect could be tied to a specific entry or group of entries. Again, this is crucial evidence needed to sustain an allowance claim.

> If the Court were to accept otherwise, it runs the risk of illegally assigning to the protested entries value allowances for merchandise in non-protested entries and, in so doing, would contravene the rule from *Alyeska Pipeline Serv. Co. v. United States*, 10 CIT 510, 643 F. Supp. 1128 (1986), *reh'g granted*, 11 CIT 931 (1987), *vacated as moot on other grounds*, unpublished order (May 19, 1988). In *Alyeska Pipeline*, Customs had advanced the value of merchandise in a single entry to cover value advances (i.e., reappraisements) relating to twenty four additional entries of identical merchandise, including two of which were not before the court. The court rejected this action, finding that "[t]he law does not permit the Customs Service to assign one entry the values of merchandise in other entries or the duties owing to them." The court went on to conclude that "a value adjustment to imported merchandise may be reflected only on the entry or entries which cover the imported merchandise. It follows that the only proper value increase for the entry in question would be one reflecting the value of the merchandise covered by that entry and no other merchandise." Similarly, it also follows here that a value allowance must relate to the merchandise entered under a specific entry(ies).

Samsung, at ____, 35 F. Supp.2d at 949 (citations and footnote omitted). In sum, Fabil wholly fails to establish, or indicate that it could establish, its proof of loss with any certainty or reliability. And, Fabil fails to link the diminution in value due to defects in specific merchandise to any particular entry(ies). It is thus impossible to calculate an appropriate allowance in value for the allegedly defective merchandise. Accordingly, even if the Court were to accept that Fabil could tie the allegedly defective merchandise to entries of imported merchandise, the Court still would grant summary judgment to defendant because Fabil cannot establish an appropriate allowance.

V.

CONCLUSION

For the foregoing reasons, Customs' decision not to grant plaintiff an allowance for defective merchandise is sustained, and summary judgment is granted in favor of defendant. Judgment will be entered accordingly.

(Slip Op. 99–56)

SKF USA INC., SKF FRANCE S.A. AND SARMA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR

Consolidated Court No. 97–01–00054

Plaintiffs, SKF USA Inc., SKF France S.A. and Sarma (collectively "SKF"), move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews ("Final Results")*, 61 Fed. Reg. 66,472 (Dec. 17, 1996). Specifically, SKF claims Commerce erred in: (1) disregarding SKF's negative home market billing adjustment in the calculation of foreign market value ("FMV") while retaining positive billing adjustment values; and (2) including in SKF's U.S. sales database sample transactions for which SKF received no consideration.

Held: SKF's motion for judgment on the agency record is granted in part and denied in part. Commerce's treatment of SKF's home market billing adjustments is affirmed. The Court remands this case to Commerce to exclude from SKF's U.S. sales database any samples for which SKF received no consideration.

[SKF's motion for judgment on the agency record granted in part and denied in part.]

(Dated June 29, 1999)

Steptoe & Johnson (Herbert C. Shelley and *Alice A Kipel)* for plaintiffs.

David W. Ogden, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis*, Assistant Director); of counsel: *Mark A Barnett*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs,[1] SKF USA Inc., SKF France S.A. and Sarma (collectively "SKF"), move pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce") final results of the administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews ("Final Results")*, 61 Fed. Reg. 66,472 (Dec. 17, 1996).

[1] This consolidated case previously involved a separate Rule 56.2 motion (Court No. 97–01–00094) filed by The Torrington Company ("Torrington"), in which SNR Roulements intervened as defendant-intervenor. Torrington's motion was consolidated with SKF's motion. *See SKF USA Inc. v. United States*, Court No. 97–01–00054, (CIT docketed Apr. 25, 1997) (order consolidating, *inter alia*, SKF's motion (Court No. 97–01–00054) with Torrington's motion under lead case number 97–01–00054). Thereafter, upon Torrington's consent motion, Torrington's cause of action was severed and dismissed. *See SKF USA Inc. v. United States*, Court No. 97–01–00054, (CIT docketed Mar. 30, 1998) (order severing and dismissing Torrington's case, Ct. No. 97–01–00094).

BACKGROUND

The administrative review at issue[2] encompasses antifriction bearings ("AFBs") (other than tapered roller bearings) and parts thereof, imported from France during the review period covering May 1, 1993 through April 30, 1994. Commerce published the preliminary results of the subject review on December 7, 1995. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Japan, Singapore, Sweden, Thailand, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Notice of Intent to Revoke Order*, 60 Fed. Reg. 62,817. On December 17, 1996, Commerce published the Final Results at issue. *See* 61 Fed. Reg. 66,472.

SKF claims Commerce erred in the Final Results by: (1) using SKF's positive home market billing adjustment in the calculation of foreign market value ("FMV"), while disregarding SKF's corresponding negative home market billing adjustment in the FMV calculations; and (2) including sample transactions for which SKF received no consideration in SKF's U.S. sales database when calculating United States Price ("USP").

DISCUSSION

This Court has jurisdiction in this case pursuant to 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Disparate Treatment of Upward and Downward Home Market Billing Adjustments*

The amount of an antidumping duty, imposed to correct the effects of dumping, is determined by comparing FMV[3] to USP. *See* 19 U.S.C. § 1677b (1988). In making this comparison, various adjustments are made to both sides of the calculation for certain costs, expenses and duties, pursuant to statute. The "absolute dumping margin" is the amount by which FMV exceeds USP after the appropriate upward and downward adjustments are made, pursuant to statutory provisions and Com-

[2] Because this administrative review was initiated prior to January 1, 1995, the applicable law is the antidumping statute as it existed prior to the amendments made pursuant to the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

[3] In this case, Commerce calculated FMV for SKF based on home market sales.

merce's regulations. *See Zenith Elecs. Corp. v. United States*, 14 CIT 831, 834, 755 F. Supp. 397, 403 (1990), *aff'd*, 988 F.2d 1573 (Fed. Cir. 1993). These adjustments to FMV include post-sale price adjustments or "billing adjustments" made to home market sales which directly affect the accuracy of reported prices and, hence, of the dumping analysis. *See, e.g., Sugiyama Chain Co. v. United States*, 19 CIT 328, 335, 880 F. Supp. 869, 874 (1995).

In this case, in the French home market, SKF reported two types of billing adjustments in its questionnaire response: billing adjustment number one and billing adjustment number two. Billing adjustment number one represented credits or debits attributable to specific sales that were reported on a transaction-specific and product-specific basis.[4] *See* SKF's Mem. Supp. Mot. J. Agency R. at 5. Billing adjustment number two represented debits and credits related to multiple invoices, multiple invoice lines, or multiple products, and applied only to certain French home market sales.[5]

SKF did not report billing adjustment number two on a transaction-specific basis, or on a fixed and constant percentage of sales for all transactions as Commerce requires. *See Final Results*, 61 Fed. Reg. at 66,499. Instead, SKF calculated and reported the adjustment using customer-specific allocations. SKF asserts that the adjustments in question cannot be tied to a specific transaction because an affiliate may issue a credit or debit note related to multiple invoices, products or invoice lines. *See* SKF's Mem. Supp. J. Agency R. at 20.

In the Final Results, Commerce rejected SKF's methodology for reporting billing adjustment number two as a direct adjustment to the price of SKF's home market sales. *See* 61 Fed. Reg. at 66,498. However, rather than rejecting SKF's billing adjustment number two in its entirety, Commerce retained SKF's positive billing adjustment values (increasing dumping margins) while rejecting the negative billing adjustment values (which would have reduced the dumping margins). *Id.* at 66,499.

SKF's contentions objecting to Commerce's treatment of billing adjustment number two are two-fold. First, SKF argues that Commerce should have accepted all of SKF's billing adjustments, both positive and negative, as reported by SKF. Second, SKF contends that Commerce erred by engaging in disparate treatment of positive and negative values reported under billing adjustment number two. In the Final Results, Commerce determined the following:

> [W]e have not treated improperly allocated HM [home market] price adjustments as [indirect selling expenses], but have instead disallowed negative (downward) adjustments in their entirety. We have included positive (upward) HM price adjustments (e.g., positive billing adjustments that increase the final sales price) in our

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[4] Billing adjustment one is not at issue in this case.

[5] The home market sales were made by Steyr Wälzlager ("Steyr") during the period of review. Steyr is an Australian sales company that is related to the French SKF companies through a common parent, AB SKF. *See Final Results*, 61 Fed. Reg. at 66,487.

> analysis. The treatment of positive billing adjustments as direct adjustments is appropriate because disallowing such adjustments would provide an incentive to report positive billing adjustments on an allocated (e.g., customer-specific) basis in order to minimize their effect on the margin calculations. That is, if we were to disregard positive billing adjustments, which would be upward adjustments to FMV, respondents would have no incentive to report these adjustments on a transaction-specific basis, as requested.

Id. at 66,498.

Commerce explained that it established a general policy of making direct adjustments to FMV for discounts, rebates and price adjustments. Pursuant to this policy, Commerce makes direct adjustments to FMV if the discounts, rebates, or price adjustments are reported only on (1) a transaction-specific basis, or (2) if they were granted as a fixed and constant percentage of sales price. If the price adjustments are otherwise allocated or reported, Commerce generally disallows claims for those price adjustments. *Id.*

Commerce claims that it applied this policy to SKF and, therefore, denied any negative price adjustments decreasing FMV. However, Commerce included SKF's positive adjustments asserting that this was consistent with the principle that a party should not benefit from its improper reporting. Def.'s Partial Opp'n to Mot. J. Agency R. at 5.

Torrington supports Commerce's selective response to the billing adjustments and asserts that Commerce's action conforms with its general practice regarding reporting failures. Citing *INA Walzlager Schaeffler KG v. United States*, 21 CIT ____, ____, 957 F. Supp. 251, 265–68 (1997), Torrington further contends that Commerce's action is consistent with this Court's decision affirming a similarly selective response in connection with billing adjustments in a prior review. Torrington's Opp'n to Mot. J. Agency R. at 13.

In its reply, SKF argues that, contrary to the positions of Torrington and Commerce, there is no "positive billing adjustment" and no "negative billing adjustment." Rather, SKF contends that billing adjustment number two is a single adjustment that may, in any given period and for any given customer, be either a negative value or a positive value. Hence, SKF states that it treats negative and positive billing adjustments in a like fashion and argues that Commerce should use the adjustments in the same manner in its margin calculations. SKF's Reply Mem. Supp. Mot. J. Agency R. at 2–3. Further, SKF contends that Commerce incorrectly assumes that billing adjustment number two can be linked to a particular transaction or a fixed constant percentage of all transactions reported. According to SKF, the inability to report on a transaction-specific basis is due to the nature of the adjustment and not to SKF's reporting failure. *Id.* Therefore, SKF urges that the selective use of positive values and rejection of negative values was done in a punitive and result-oriented manner. *See* SKF's Mem. Supp. Mot. J. Agency R. at 2.

Commerce adjusts FMV and USP for discounts, rebates, and other billing adjustments pursuant to 19 U.S.C. §§ 1677a, 1677b (1988), which

require Commerce to determine what price was actually charged for subject merchandise. FMV can be adjusted for direct or indirect expenses. Direct selling expenses vary with the quantity sold, *see Zenith Elecs. Corp. v. United States*, 77 F.3d 426, 431 (Fed. Cir. 1996), or are specifically "related to a particular sale." *Torrington*, 68 F.3d at 1353. In the instant case, none of the parties disputes the direct nature of the adjustments to FMV.

It is well-established that Commerce's decision to deny a direct adjustment to FMV is reasonable and proper if the adjustment sought is not reported in either a transaction-specific basis or as a fixed and constant percentage of the sales price of all transactions for which it was reported. *See SKF USA Inc. v. United States*, 19 CIT 625, 633, 888 F. Supp. 152, 159 (1995); *SKF USA Inc. v. United States*, 19 CIT 79, 875 F. Supp. 847, 86, 853 (1995); *SKF USA Inc. v. United States*, 19 CIT 54, 65, 874 F. Supp. 1395, 1405 (1995). "The party seeking a direct price adjustment bears the burden of proving entitlement to such an adjustment." *SKF USA Inc.*, ___ F.3d at ___, 1999 U.S. App. LEXIS 11991, at *18–19, 1999 WL 378537, at *6 (Fed. Cir. June 10, 1999) (citing *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996)). Because the improper reporting made it impossible for Commerce to determine if the claimed adjustment pertained to subject merchandise, Commerce determined that SKF had not met its burden. Commerce, therefore, properly declined to make the downward adjustments because of SKF's failure to tie the expenses to specific transactions or products. *See Torrington*, 82 F.3d at 1050–51.

The gravamen of this dispute is therefore whether Commerce properly applied the upward billing adjustments to FMV, while rejecting the downward billing adjustments. Under 19 U.S.C. § 1677e(b), if Commerce is unable to verify the accuracy of the information submitted in a review, it has the authority to apply best information available ("BIA") to prevent a respondent from benefitting from its own reporting failure. In particular, Commerce has the discretion to resort to BIA when it believes that the respondent, through refusal or inability, is not complying with the investigators. *See* 19 U.S.C. 1677e(c) ("[W]henever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [Commerce shall] use the best information available."); *see also Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT 906, 912, 865 F. Supp. 857, 863 (1994) ("Commerce lacks subpoena power, but the BIA provision is a means of obtaining compliance with Commerce's requests for information.") (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Although Commerce did not make its determination regarding the billing adjustments in the Final Results in the context of a BIA analysis, Commerce's treatment of SKF's billing adjustments is consistent with the BIA laws and the spirit behind them.

In essence, SKF's main argument is that, because Commerce chose to accept SKF's upward adjustments to FMV, it must accordingly accept SKF's downward adjustments. In the alternative, SKF argues that Commerce should have rejected the positive adjustments since it rejected the negative adjustments. These propositions, however, are not reflected in the law. There is no requirement that Commerce treat modifications that increase respondent's dumping margin and adjustments that decrease the margin in the same manner. Rather, the law supports the opposite conclusion. *See SSAB Svenskt Stal AB v. United States*, 21 CIT ____, ____, 976 F. Supp. 1027, 1032 (1997) (upholding Commerce's selection of the highest packing costs reported by respondent for U.S. sales with no accompanying deduction of packing expenses for FMV); *see also INA Walzlager Schaeffler KG v. United States*, 21 CIT ____, ____, 957 F. Supp. 251, 265–68 (1997) (remanding to Commerce to deny negative billing adjustments with no corresponding instructions regarding positive adjustments), *opinion after remand*, 1997 Ct. Intl. Trade LEXIS 147, 1997 WL 614300, Slip Op. 97–141 (Sept. 29, 1997), *aff'd sub nom*, *SKF USA Inc. v. INA Walzlager Schaeffler KG*, ____ F.3d ____, 1999 U.S. App. LEXIS 11991, 1999 WL 378537 (Fed. Cir. June 10, 1999). This is particularly true when Commerce is given data that is not responsive to its request for information, or when the respondent submits information in an improper form.

In *INA*, for example, Commerce treated certain home market expenses, including negative billing adjustments reported by a respondent on a customer-specific basis, as indirect billing expenses. Commerce treated positive billing adjustments as direct expenses to be deducted from FMV. *Id.* at 265. The Court held that negative home market adjustments could not be treated as indirect expenses, because by their very nature, the adjustments constituted direct expenses. *Id.* at 267. The Court therefore remanded to Commerce to deny any adjustment to FMV for the respondent's negative billing adjustment because the adjustment was improperly reported. *Id.* at 268.

INA held that both positive and negative adjustments have the same *nature*, i.e., both types of adjustments are direct adjustments to FMV and must be reported in a particular manner. Although *INA* did not expressly address the issue of disparate treatment of positive and negative billing adjustments, the Court's order in *INA* remanding to Commerce to deny adjustment's to FMV for respondent's negative billing adjustments only, clearly indicates the Court's position that the law does not require either a blanket denial or a uniform acceptance of upward and downward billing adjustments to FMV.

SKF mistakenly relies on *U.H.F.C. Co. v. United States*, 916 F.2d 689 (Fed. Cir. 1990), to support its assertion that a respondent's inability to provide information in the form requested precludes the application of a BIA approach. *See* SKF's Mem. Supp. J. Agency R. at 22–23. In *U.H.F.C.*, the court found that Commerce incorrectly resorted to BIA when applying price adjustments to a respondent that did not supply the requested

cost of production ("COP") information. However, in *U.H.F.C.*, the court determined that Commerce was requesting, and was in fact penalizing respondent for not providing, information that was *irrelevant* to its calculations. *See U.H.F.C.*, 916 F.2d at 701 (holding that Commerce erroneously used BIA based on respondent's failure to submit the product's COP data, when that data was not relevant in the adjustment calculations).

Similarly, SKF misreads *Koyo Seiko Co. v. United States*, 92 F.3d 1162 (Fed. Cir. 1996). SKF asserts that *Koyo* prohibits the disparate treatment of billing adjustments in FMV calculations. SKF's Mem. Supp. Mot. J. Agency R. at 19. However, in *Koyo*, unlike the present case, Commerce's authority to use BIA was not implicated since Commerce did not dispute that the deduction sought[6] was properly reported and supported in the record. *Koyo*, 92 F.3d at 1167.

Finally, SKF itself indicated that there were positive billing adjustments which increased the dumping margin. Commerce exercised its discretion to grant the adjustment as reported. Prohibiting Commerce from granting the upward adjustment in this case, especially when the adjustment was reported by the respondent, would limit Commerce's ability to obtain the information it requires in the appropriate form. The Court finds Commerce's application of billing adjustments to be a proper exercise of its authority to grant or deny adjustments.

2. *Inclusion of Sample Transactions Unsupported by Consideration in SKF's U.S. Sales Database*

During this review, Commerce included in SKF's U.S. sales database zero-priced sample transactions. SKF argues that this case should be remanded to Commerce with instructions, pursuant to *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997), to exclude SKF's zero-value U.S. transactions from the dumping margin calculations. SKF's Mem. Supp. Mot. J. Agency R. at 37.

Commerce agrees that a remand under *NSK* is proper and that, on remand, it should exclude sample transactions for which no consideration was given in its computation of SKF's U.S. sales. Def.'s Partial Opp'n to Mot. J. Agency R. at 3.

Although Torrington concedes that a remand may be appropriate in light of *NSK*, Torrington argues that SKF failed to demonstrate that the transactions in question lacked "consideration" as defined by *NSK*, and that further factual inquiry is necessary. Torrington's Opp'n to Mot. J. Agency R. at 14. Torrington asserts that there is a distinction between "zero-price samples" given to the United States customer and transactions unsupported by consideration, which may come in different forms. In the alternative, Torrington argues SKF failed to provide sufficient record evidence to demonstrate that the "sample" transactions were in fact made outside the "ordinary course of trade," as required by statute.

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[6] Specifically, in *Koyo*, the respondent sought an adjustment to USP to correspond to a deduction of indirect selling expenses from FMV.

Id. at 15. Therefore, Torrington argues that Commerce should be affirmed, or that the matter should be remanded to Commerce to obtain additional data regarding the U.S. sample transactions. *Id.* at 16.

Commerce is required to impose antidumping duties upon merchandise that "is being, or is likely to be, *sold* in the United States at less than its fair value." 19 U.S.C. § 1673(1) (1988) (emphasis added). A sale requires both a transfer of ownership to an unrelated party and consideration. *NSK*, 115 F.3d at 975. In other words, a transaction that involves no consideration is not a sale. Therefore, the distribution of AFBs for no consideration falls outside the purview of 19 U.S.C. § 1673. Consequently, the Court remands to Commerce to exclude from SKF's U.S. sales database any transactions that were not supported by consideration, and to adjust the dumping margins accordingly.

CONCLUSION

The Court affirms Commerce's determination to apply SKF's positive billing adjustment in its FMV calculations while declining to apply the negative adjustment to FMV. The Court remands for Commerce to exclude from SKF's U.S. sales database any transactions unsupported by consideration.

NOTE: This is to advise that Slip Op. 99–57 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 99–57)

TAIWAN SEMICONDUCTOR INDUSTRY, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 98–05–01460

(Dated June 30, 1999)

(Slip Op. 99–58)

ASOCIACION DE PRODUCTORES DE SALMON Y TRUCHA DE CHILE AG, PLAINTIFF *v.* U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT, AND COALITION FOR FAIR ATLANTIC SALMON TRADE, DEFENDANT-INTERVENOR

Court No. 98–09–02759

(Dated July 2, 1999)

ORDER

GOLDBERG, *Judge:* Upon consideration of the June 8, 1999 motion for remand of defendant United States International Trade Commission ("the Commission"), the June 28, 1999 response in support of remand of plaintiff Asociacion de Productores de Salmon y Trucha de Chile AG, and the June 28, 1999 response in opposition to remand of defendant-intervenor Coalition for Fair Atlantic Salmon Trade, it is hereby

ORDERED that the above-captioned action is remanded to the Commission to reopen the administrative record to verify the accuracy of its foreign production, shipments, and capacity data; and it is further

ORDERED that the Commission shall take any action necessary after reexamining the foreign production, shipments, and capacity data; and it is further

ORDERED that the Commission shall issue a remand determination within ninety (90) days of the date of this order, with no further extensions; and it is further

ORDERED that defendant and defendant-intervenor shall file response briefs to plaintiff's motion for judgment upon the agency record within thirty (30) days of the date on which the Commission issues its remand determination, and that those parties shall incorporate comments to the remand determination, if any, into said response briefs; and it is further

ORDERED that plaintiff shall file a reply brief within twenty-five (25) days of the date of service of defendant and defendant-intervenor's response briefs, and that plaintiff shall incorporate comments to the remand determination, if any, into said reply brief.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/92 5/11/99 Goldberg, J.	Mita Copystar America	91–10–00773	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Atlanta, Dallas, and New York Photocopier toner cartridges
C99/93 5/13/99 Goldberg, J.	Mita Copystar America	91–5–00345	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Atlanta and Chicago Photocopier toner cartridges
C99/94 5/13/99 Goldberg, J.	Mita Copystar America	94–6–00337	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Dallas and New York Photocopier toner cartridges
C99/95 5/13/99 Goldberg, J.	Mita Copystar America	94–12–00776	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Dallas, Los Angeles and New York Photocopier toner cartridges
C99/96 5/25/99 Ridgway, J.	Play By Play Toys & Novelties, Inc.	96–2–00430, 96–8–01896, 96–8–01999	6307.90.9989 7%	9404.90.2000 6%	Agreed statement of facts	Los Angeles Stuffed man-made fiber pillows
C99/97 5/26/99 Goldberg, J.	Mita Copystar America	96–2–00370	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Dallas Photocopier toner cartridges
C99/98 5/28/99 Goldberg, J.	Mita Copystar America	91–1–00010	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	New York and Chicago Photocopier toner cartridges
C99/99 5/28/99 Goldberg, J.	Mita Copystar America	95–9–01174	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Dallas Photocopier toner cartridges

ABSTRACTED CLASSIFICATION DECISIONS—*Continued*

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C99/100 6/2/99 Aquilino, J.	Brundidge Construction Equipment Co.	98–12–03242	8704.23.0000 or 8704.22.50 Not stated	8704.10.50 Not stated	Agreed statement of facts	Tacoma Morooka brand MST 400 V and two Morooka brand MST 3300 V dump carriers
C99/101 6/2/99 Aquilino, J.	NAPP Systems, Inc.	97–2–00221	3902.90.0050 Not stated	4002.99.0000 Not stated	Agreed statement of facts	Los Angeles Ten entries of synthetic rubber material designated by the importer as MAR TA–906
C99/102 6/4/99 Pogue, J.	Micron Electronics, Inc.	97–4–00513	8471.91.8085 3.5%	8473.30.5000 Free of duty	Agreed statement of facts	Minneapolis Cases for computers
C99/103 6/11/99 Aquilino, J.	Mita Copystar America	95–9–01174	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Dallas Photocopier toner cartridges
C99/104 6/17/99 Goldberg, J.	Mita Copystar America	91–12–00890	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	New York, Dallas, Atlanta Photocopier toner cartridges
C99/105 6/17/99 Goldberg, J.	Mita Copystar America	95–6–00755	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	New York Photocopier toner cartridges
C99/106 6/17/99 Goldberg, J.	Mita Copystar America	95–6–00757	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	Dallas Photocopier toner cartridges

C99/107 6/22/99 Aquilino, J.	Diachem Indus. Ltd.	98–4–00905	3824.90.28 3.0¢ per kilogram + 12.2%	3815.90.50 5%	Agreed statement of facts	Blaine DIAQ, which is comprised of anthraquinone water & surfactants
C99/108 6/23/99 Barzilay, J.	P&K Int'l Ltd.	98–2–00252	4202.92.9040 19.5%	6307.90.99.89 7%	Agreed statement of facts	Not stated Soft-sided casserole dish caddie bags with textile-backed PVC sheeting Style No. 15400, used to transport food
C99/109 6/24/99 Barzilay, J.	Diachem Indus. Ltd.	96–6–01636, 96–10–02379, 97–3–00359	3823.90.28 or 3824.90.28 3.3¢ per kilogram +12.9% or 3.0¢ per kilogram +12.2%	3815.90.50 5%	Agreed statement of facts	Blaine DIAQ, which is comprised of anthraquinone, water & surfactants
C99/110 6/28/99 [amends stipulated judgment entered & served 5/20/98, paragraph 3 to correct subheading to read 6908.90.00 in place of 9608.90.00]	Apex Universal, Inc.	95–10–01286	6908.90.00 19%, 16.9%, or 15.8%	6914.90.00 or 6914.90.80 8%, 7%, or 6.6%	Agreed statement of facts	Los Angeles Ceramic road markers
C99/111 6/29/99 Goldberg, J.	Mita Copystar America	96–3–00800	3707.90.30 or 3707.90.32 6.9%, 7.3%, 7.7%, 8.1%, or 8.5%	9009.90.00 or 9009.90.50/80 3.9% or Free of duty	Mita Copystar America *v.* U.S. 160 F.3d 710 (1998)	New York Photocopier toner cartridges

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V99/50 5/10/99 Aquilino, J.	University of Michigan	91–10–00762	19 U.S.C. 1401a(f)	$1,000.00 net, lot packed	Agreed statement of facts	Detroit Inter-leukin–6
V99/51 7/6/99 Aquilino, J.	Caterpillar Inc.	97–4–00598	Amount of refunded value added tax was included by Customs Service in appraised value of the merchandise under 19 U.S.C. 1401a	Amount of value added tax payments made by Caterpillar & subsequently refunded by Gov't of the United Kingdom are not properly included in the "price actually paid or payable" for subject merchandise when sold for exportation within 19 U.S.C. 1401a(b)(1)	Caterpillar Inc. *v.* U.S., 941 F. Supp. 1241 (CIT 1996)	Houston Truck components

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